TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 19

NATIONAL UNION OF MARINE COOKS AND STEWARDS, A VOLUNTARY ASSOCIATION, PETITIONER,

vs.

[illegible] ARNOLD, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED JANUARY 11, 1954

CERTIORARI GRANTED MARCH 1, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No.

NATIONAL UNION MARINE COOKS & STEWARDS, ET AL., PETITIONERS,

vs.

GEORGE ARNOLD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 7, 1953.

—1935

[fol. 1] [File endorsement omitted]

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

GEORGE ARNOLD, et al., Plaintiffs,

vs.

NATIONAL UNION OF MARINE COOKS & STEWARDS ASSOCIATION, et al., Defendants

JUDGMENT—September 4, 1951

The above cause came regularly on for trial before the undersigned Judge of the Superior Court of the State of Washington for Spokane County, sitting in King County, with a jury, on Monday, June 4, 1951, at 10:00 A.M.; some of the plaintiffs being present in person and all of them being represented by Samuel B. Bassett and John Geisness, their attorneys; defendant National Union of Marine Cooks & Stewards, a voluntary association, impleaded herein as National Union of Marine Cooks & Stewards Association, a voluntary association, being represented by George R. Andersen and John F. Walthew, its attorneys; and defendant Joseph Harris being represented by John Caughlan, his attorney; and the cause having been duly and regularly tried before a jury properly impaneled and sworn to try the same; and the said jury having returned a verdict in favor of each plaintiff in the sum of $5000.00; and the motions of defendants for judgment N.O.V. and for a new trial having been argued, considered and denied, it is now ordered, adjudged and decreed:

That plaintiff George Arnold have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Alvin Bailey have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff John C. Baine have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff B. F. Barrett have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 2] That plaintiff Dale A. Becks have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Don Bickford have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Charles Birdsall have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Elmer J. Blanes have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff George C. Boettger have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Gerald Bosley have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Carol E. Campbell have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff A. W. Charlesworth have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Burr D. Cline have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Joseph Cline have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Robert Cooney have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff J. R. Costello have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Harold S. Darling have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff George Davey have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Eugene A. Douglas have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Dean H. Douglas have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 3] That plaintiff Howard Dow have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff John Roger Dyer have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Dewey Erlwein have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Francis Forde have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Willard S. Francis have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Robert C. Friend have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Robert Galbraith have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff William C. Game have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Joseph Green have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff George Heard have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Ernest Henry have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Herbert Hill have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff T. J. Howard have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff William Jenkins have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Robert Jewell have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Edsel Johns have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 4] That plaintiff Arnold W. Johnson have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Charles L. Johnson have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Frank Johnson have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff A. L. Jones have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Art D. King have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Harold Krause have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Harley E. Krone have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Frank Lachica have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff William Lande have and recover of and from the defendant and each and both of them the sum of $5000.00;

That plaintiff Percy Landrigan have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Marvin F. Lantz have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Louis Larsen have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Cliff Lattish have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Jose Lorente have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Cy Lord have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Norman Maginn have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 5] That plaintiff A. L. Makenson have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff J. Ralph Mann have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Tony Manzano have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Tom McCaffery have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Hugh McIntyre have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Thomas C. McMannus have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff William B. Miller have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff C. C. Moody have and recover of and from

the defendants and each and both of them the sum of $5000.00;

That plaintiff Charles Mosher have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Al Mundt have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff George O'Leary have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Harold Paige have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Bernard M. Paluck have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Jack Patterson have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Frank C. Ponce have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Clarence Reese have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 6] That plaintiff G. Responte have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Virgil Rogers have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Jack Roper have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Dan Rotan have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Don Rotan have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Clarence Rothaus have and recover of and

from the defendants and each and both of them the sum of $5000.00;

That plaintiff Mathias Sabo have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff H. J. Schuchard have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Frank Schulpeck have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Ernest Shearer have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff John Siewick have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Gus Sinclair have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff A. Sirriani have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Leslie Smith have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff John Smocsyk have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Fred Starks have and recover of and from the defendants and each and both of them the sum of $5000.00;

[fol. 7] That plaintiff Les Taft have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Jack Taylor have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff James Triana have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Don W. Tyler have and recover of and

from the defendants and each and both of them the sum of $5000.00;

That plaintiff Daniel Varady have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Pedro Villabol have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Hubert Whaley have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Al Baide have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff John Boers have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Max Schlossel have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiff Carl W. Singer have and recover of and from the defendants and each and both of them the sum of $5000.00;

That plaintiffs have and recover of and from the defendants and each and both of them the costs and disbursements of this action.

Done in open court this 4th day of September, 1951.

Carl C. Quackenbush, Judge.

Copy rec'd this 28th day of August, 1951. John Caughlan, Attorney for defendant, Joseph Harris.

Presented by: John Geisness, of Attorneys for Plaintiffs.

Approved as to form: —— ——, Attorneys for Defendant Union; —— ——, Attorney for Defendant Harris.

Copy received Aug. 28, 1951. Walthew, Gershon, Yothers & Warner Z. Trimble.

[fol. 8] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT—Filed September 5, 1951

To George Arnold, et al., plaintiffs above named, and to each and every one thereof, and

To Bassett & Geisness, their attorneys:

You, and each of you are hereby notified that the above named defendants do hereby appeal to the Supreme Court of the State of Washington from that certain judgment entered in this cause on the 5th day of September, 1951, and from each and every part thereof.

Dated at Seattle, Washington, this 5th day of September, 1951.

Walthew, Gershon, Yothers & Warner, attorneys for National Union of Marine Cooks & Stewards Association, defendant, and John Caughlan, attorney for defendant Joseph Harris.

[fol. 9] IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

[Title omitted]

ADJUDICATION OF CONTEMPT—April 4, 1952

This matter came regularly before the above entitled Court upon an order requiring the defendant National Union of Marine Cooks & Stewards, a voluntary association, impleaded as National Union of Marine Cooks & Stewards Association, to show cause why it should not be adjudged in contempt of court for its failure to comply with the order of this Court, made and entered February 11, 1952, appointing a receiver herein and directing the transfer of certain assets, and by reason of its failure to assign, transfer and deliver the bonds therein mentioned to such receiver and

further to show cause why said receiver should not be authorized and directed to exercise further powers as receiver and why said defendant and others should not be enjoined and restrained in certain respects, and the matter having been argued on March 14, 1952, at the hour of 2:00 p. m., the return time fixed by said order, and having been thereupon postponed to March 28, 1952, at 2:00 p. m., and having again come on for hearing at said time, the plaintiffs being represented by their attorneys Samuel B. Bassett and John Geisness, and the defendant voluntary association not appearing but certain individual officers of said defendant association being represented by John Caughlan and Siegfried Hesse, their attorneys, and certain proposed intervenors being represented by Sarah H. Lesser, their attorney, and the Court having heard and considered the statements and arguments of counsel, and having examined the files and records herein and the affidavit of said receiver submitted in support of his motion for said order to show cause, and other evidence herein, the Court finds that said [fol. 10] defendant voluntary association has wilfully and contemptuously failed and refused, and still fails and refuses, to deliver to said receiver certain United States bonds, although expressly ordered to do so by an order made and entered in the above entitled cause February 15, 1952, and although certified copies of said order were served upon said defendant voluntary association, as appears by return and affidavit of service on file herein, and it further appearing that said voluntary association has said bonds in its possession and under its control and has given no explanation or justification for its failure to assign, transfer and deliver said bonds to said receiver pursuant to said order of this Court and that written demands for delivery of said bonds, pursuant to said order, received by said voluntary association on February 23, 1952, and February 25, 1952, have been ignored, it is now, therefore,

Ordered, adjudged and decreed that the defendant National Union of Marine Cooks & Stewards, a voluntary association, impleaded herein as National Union of Marine Cooks & Stewards Association, be and the same hereby is adjudged in contempt of this Court, and that said contemptuous conduct of said defendant frustrates the enforce-

ment of the judgment herein in favor of the plaintiffs and against the defendants and frustrates the receivership created herein by order of this Court;

It is further ordered that the hearing upon the remaining issues raised by said order to show cause be and the same hereby is postponed to Friday, April 11, 1952, at the hour of 2:00 p. m.

Malcolm Douglas, Judge.

Done in open court this 4th day of April, 1952.

Presented by: John Geisness, of Counsel for Plaintiffs.

Copy Received date April 1, 1952. Firm Hatten & Lesser by Sarah H. Lesser.

Received Mar. 31, 1952. Walthew, Gershon, Oseran & Warner, Z. T.

Received Apr. 1, 1952. John Caughlan, Siegfried Hesse.

Filed 1952. Apr. 4 AM 10:06. Norman R. Riddell, Clerk, King County, Wash.

[fol. 11] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 31984

GEORGE ARNOLD, et al., Respondents

vs.

NATIONAL UNION OF MARINE COOKS & STEWARDS ASSOCIATION, et al., Appellants

MOTION FOR DISMISSAL OF APPEAL—Filed April 2, 1952

Come now the respondents in the above cause and respectfully move this Honorable Court as follows:

1. That the above entitled appeal of appellants and each and both of them be dismissed, or

2. That the appeal of the appellant National Union of Marine Cooks & Stewards, a voluntary organization, be dismissed, or

3. That the brief of appellants be stricken,

4. That such other order be made as to the Court may appear proper.

This motion is based upon the files and records herein and upon the affidavit of John Geisness set forth below.

Bassett, Geisness & Vance, Attorneys for Respondents.

STATE OF WASHINGTON,
County of King, ss:

JOHN GEISNESS, being first duly sworn, on oath deposes and says: In the Superior Court in King County, in the above entitled cause, being George Arnold, et al., Plaintiffs, v. National Union of Marine Cooks & Stewards Association, a voluntary association, et al., Defendants, King County Cause No. 411247, judgment was entered in favor of the [fol. 12] plaintiffs and against each and both of the defendants September 5, 1951, in the total sum of $475,000.00. The above entitled appeal is now pending from said judgment but the same has not been superseded.

Supplemental proceedings were initiated October 19, 1951, by an order issued out of said Superior Court in said cause and said order directed said association to bring certain documents. Said supplemental proceedings have at all times since been pending and are still pending. On or about November 8, 1951, a supplemental order was issued directing the association to bring certain documents listed in said order. Said association altogether failed to produce certain financial records and reports which the order directed it to produce. November 20, 1951, said Superior Court made an order requiring said association to show cause why it should not be punished for contempt of Court for failure to produce said financial records. On January 7, 1952, after due notice, said Superior Court made an order adjudging said voluntary association in contempt of court for failure to produce said documents in violation of said order and the matter was thereupon continued to January 14, 1952, to afford said voluntary association an opportunity to purge itself from such contempt and by said last mentioned date said association had purged itself of contempt by producing

said documents. On or about the 25th day of January, 1952, said Superior Court made an order directing said association to show cause why a receiver of the property of said association should not be appointed by the court.

On the 15th day of February, 1952, there was made and entered in said cause in said Superior Court an order appointing Wilbur Zundel receiver of the assets of said association and directing transfer to said receiver of United States Bonds in the total amount of $298,000.00. A true and correct copy of said order is attached hereto and marked Exhibit A and incorporated herein by this reference. On or about the 20th day of February, 1952, a cer-
[fol. 13] tified copy of said order was duly, regularly and properly served upon said association by the sheriff of King County. And on or about the 3rd day of March, 1952, a certified copy of said order was served upon the voluntary association in San Francisco, California. On or about February 21, 1952, said receiver, by a letter sent through the United States mail, demanded that said association comply with said order and assign, transfer and deliver said bonds to him. Receipts have been received showing that one of said letters was delivered to said association in Seattle, Washington on February 23, 1952, and that the other was delivered to said association in San Francisco, California on February 25, 1952.

Said voluntary association has altogether failed and refused, and still fails and refuses, to deliver to said receiver said bonds or any part of said bonds, and has given no explanation to said receiver or to the Court or to the plaintiffs in said cause or their counsel for its failure to comply with said order.

The failure of said association to comply with said order is frustrating enforcement of the judgment which is the subject of the above appeal and is frustrating the receivership created and existing in said cause in said Superior Court by virtue of said order of said court.

On or about the 4th day of April, 1952, said Superior Court made and entered its order adjudicating said association in contempt of Court for failure to deliver said bonds and further adjudicating that said defendants' contemptuous conduct frustrates the enforcement of said judgment

and frustrates the receivership created by the Court's order.

Said bonds are, and at all times herein mentioned have been, situated in San Francisco, California. Said bonds are in the custody and under the control of officers of said association who reside in California and are beyond the juris-[fol. 14] diction of said Superior Court. Said association has no substantial assets within the jurisdiction of said Superior Court and its only assets in such jurisdiction consist of furniture and equipment used in its offices and hiring hall in Seattle, Washington. Said Superior Court is unable to exercise such coercive power against said association as to compel delivery of said bonds and said association is contemptuously ignoring the aforementioned orders of said Superior Court.

This affidavit is made in support of respondents' above motion to dismiss the appeal herein or for other relief.

John Geisness.

Subscribed and sworn to before me this 16 day of April, 1952. Robert F. Sandall, Notary Public in and for the State of Washington, residing at Seattle. (Notarial Seal.)

[fol. 15] EXHIBIT A TO AFFIDAVIT

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

No. 411,247

GEORGE ARNOLD, ET AL., Plaintiffs,

vs.

NATIONAL UNION OF MARINE COOKS & STEWARDS ASSOCIATION, ET AL., Defendants

ORDER APPOINTING RECEIVER AND DIRECTING TRANSFER OF ASSETS

The above matter came regularly before the undersigned Judge of the above entitled Court on the 5th day of November, 1951, at the hour of 10:00 o'clock in the forenoon of

said day upon an order in supplemental proceedings directing the defendant National Union of Marine Cooks & Stewards, a Voluntary Association, impleaded as National Union of Marine Cooks & Stewards Association, a Voluntary Association, and Charlie Nichols, its Agent, to appear for examination and to bring and produce certain documents, the matter having been postponed from the original return date; oral testimony was thereupon adduced and the matter continued from time to time thereafter and further evidence, both oral and documentary, was adduced, and said proceedings finally came on for hearing Friday, February 8, 1952, at the hour of 1:30 P. M. upon further order in said proceedings requiring said defendant National Union of Marine Cooks & Stewards to show cause why a receiver of its property should not be appointed, plaintiffs appearing by their attorneys Samuel B. Bassett and John Geisness of Bassett, Geisness & Vance, and said defendant association having made a purported special appearance and motion to quash service of process and being represented by its attorney John F. Walthew of Walthew, Gershon, Oseran & Warner, and John Caughlan, in support of said purported special appearance and motion to quash; and the court having heard the arguments of [fol. 16] counsel for said defendant union in support of said motion to quash, in the course of which it was admitted by said counsel that service of said Orders to show cause was made upon the defendant association in the same manner as service of Summons and Complaint in the main action upon said defendant and that said service of said Summons and Complaint was adequate to give the court jurisdiction of said main cause and of the defendant association as a defendant therein, and having heard the arguments of counsel for plaintiffs upon the merits of said proceedings, counsel for said defendant having declined argument thereon, and having considered the testimony, oral and documentary, adduced in said proceedings, the affidavits filed therein and the other records and files therein, and being fully advised in the premises, and having made its Findings of Fact and Conclusions of Law, now in accordance therewith, it is

Ordered that Wilbur Zundel be and he hereby is appointed receiver of the property of the defendant National

Union of Marine Cooks & Stewards, a voluntary association, with power, under the control and subject to the direction of the court, to take, care for, and keep possession of said defendant's property, books of account, and all property, books and papers relating to said defendant and its business, to collect debts and monies, to conduct the business of said defendant and possess and exercise its contract rights, and generally to do such acts as may be ordered by the court or be sanctioned by law; provided, that until further order of the court, said defendant shall be permitted to continue to operate its ordinary business and said receiver shall not take into his possession or control the business of said defendant, its books of account or papers, or its property or funds, excepting the United States bonds in the total amount of $298,000.00, hereinafter mentioned;

It is further ordered that said Wilbur Zundel, before [fols. 17-27] entering upon his duties as such receiver be sworn to perform them faithfully and execute an undertaking to the State of Washington, for the use of whomsoever may be injuriously affected by this receivership, in the amount of $1000.00, to the effect that he will faithfully discharge the duties of receiver in the action herein and obey the orders of the above entitled Court, and that said undertaking may be increased by the court from time to time in its discretion;

It is further ordered that said voluntary association shall assign, transfer and deliver to said Wilbur Zundel, as receiver, immediately upon his qualifying as such receiver, United States savings bonds, Series G, in the amount of $238,000.00 and United States Treasury 2½% bonds due June 15, 1972, in the amount of $60,000.00

Done in open court this 15 day of February, 1952.

Malcolm Douglas, Judge. Received April 17, 1952, Walthew, Gershon, Oseran & Warner, Z. T.

Presented by: John Geisness, of Attorneys for Plaintiffs.

[fol. 28] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ANSWERING BRIEF OF APPELLANTS UPON MOTION FOR DISMISSAL OF APPEAL—Filed May 15, 1952

Statement of the Case

Appellants have appealed from a money judgment, totalling $475,000, entered in favor of respondents. Briefs on behalf of all parties have been filed, and the case has been set for oral argument on the merits for next Thursday, May 22, 1952.

Appellants have not been able to supersede the judgment. Respondents instituted an action by way of supplemental proceedings, out of which arose the contempt adjudication which is the basis for the motion now before the court.

Appellant Harris has never been made a party to the supplemental proceedings. Appellant, The National Union of Marine Cooks & Stewards, appeared specially in the supplemental proceedings to contest the jurisdiction of the court, and to urge that, for the purpose of an order directing transference of $300,000 (approximately) in bonds to a receiver for respondents, jurisdiction over the person of the representatives and officers of the union who have control over the bonds in question is a prerequisite, the appellant union being a voluntary association of some 5,000 individuals. Appellants also sought to urge, in their special appearance to contest jurisdiction, that supplemental proceedings apply only to property within the state, or where an adequate remedy in the ordinary course of law does not [fol. 29] exist.

Prior to the entry of the order for transference of the bonds to the receiver, and the subsequent judgment of contempt when the bonds were not received by the receiver, respondents had commenced an action on the judgment in California, where all substantial assets of the appellant union exist. A demurrer to this action was sustained in the superior court of the state of California for San Francisco County, with leave to amend upon filing of non-resident cost bonds. Respondents failed to pursue this

action, but took a voluntary non-suit, and have commenced a substantially identical action in another county in California, where, they believe, they may not be required by the court to post non-resident cost bonds, i. e., they shopped for the most favorable forum within the state of California. Thus, respondents have an adequate remedy at law.

The real purpose of the supplemental proceedings was exposed by respondents on November 19, 1951, when they stated, through their attorneys, in open court, that if they could obtain any order of contempt, they believed that they could obtain a dismissal of appellants' appeal in the main action. This statement, we submit justifies us in asserting that respondents' prime motive in pursuing the supplemental proceedings, in full knowledge that appellants have no substantial assets in the state of Washington, was not to obtain enforcement of the judgment, which may well be reversed on appeal, but rather, to harrass appellants in their pursuit of their legal appellate remedies, in appeal from the judgment upon which the supplemental proceedings are founded.

On February 15, 1952, the superior court found, on the basis of financial reports of appellant union's assets, as of September 26, 1951, that the union then (i. e. on February 15, 1952) had certain bonds, valued at $298,000. The court entered an order that the union transfer these to a receiver [fol. 30] appointed for the respondents.

The court also found that it had personal jurisdiction of the appellant union by reason of service on a branch officer in Seattle, although the bonds were supposed to be in San Francisco, California, and the officers and representatives of union who had control of these assets all resided in California, and none of them was ever personally served with any process in the supplemental proceedings.

The order to transfer the bonds was not appealable: *State ex rel. Mangacang v. Sup. Ct.* (1948), 30 Wn. (2d) 692. Appellants were therefore faced with the alternative of complying with the order and transferring the $298,000 to the receiver, with the possibility of the funds (if they existed) being dissipated prior to the decision on appeal, or failing to comply, and appealing from an order of contempt. The latter is a recognized method of obtaining supreme court review of such an order: *State ex rel. Mangacang v.*

Sup. Ct., supra. Appellants have timely perfected their appeal from this adjudication of contempt.

We do not believe that it is appropriate to argue the appeal from the contempt adjudication in this brief. A jurisdictional issue presented on that appeal will be: When jurisdiction in supplemental proceedings depends upon personal service on a subordinate or branch officer of a voluntary association, may the voluntary association be adjudged in contempt on the failure of non-resident officers, who alone have control over bonds of the association, and who have not even been served, to transfer those bonds to a receiver appointed by the court? The issue thus presented is novel, and substantial. See: *Abbott v. Sherman Mines* (1937) 71 P. (2d) 1034, 41 N. Mex. 525.

The authorities cited by respondents in their brief are by [fol. 31] — means conclusive upon the issues which will be tendered upon appeal from the contempt order.

Argument on Motion to Dismiss

Respondents, in their motion, request three alternative actions of this court: (1) dismiss the appeal of both appellants, i. e., Harris (the agent), and the Union, (the principal); or (2) dismiss the appeal of the appellant union; or (3) strike the brief of both appellants.

The impropriety of the first and third alternatives is obvious from the fact that the motion is based solely on the alleged contempt of the appellant union (principal). Appellant Harris, (agent), has done nothing to justify such action. At best, therefore, all that respondents can request from this court is that the appeal of appellant union be dismissed, since to strike the brief of one appellant would mean striking the brief of both. The court will still have to hear argument on the appeal and decide every issue. Therefore, respondents' motion will accomplish nothing.

As was pointed out above, appellant union is pursuing an appropriate means of appealing the order upon which the contempt is based, and the only method by which the jurisdiction of the superior court may be determined. The contempt is only a necessary step to appellate review, and not a flagrant disregard of the superior court's order, as respondents attempt to characterize it. Assuming that this court

does sustain the jurisdiction of the superior court, the contempt (if any) is not of such nature as to justify the extraordinary coercive measures demanded by respondents.

It is appropriate to remind the court that respondents seek equitable relief. The cases cited and relied upon by them, with a single exception, are divorce cases. In only one case was an appeal involved, and there the appeal was [fol. 22] dismissed only conditionally.

In *State ex rel. Hunter v. Ronald* (1919), 106 Wash. 413, this court pointed out that one in contempt cannot be denied *legal rights* but only *affirmative equitable rights*. This court, having determined that a divorce action was equitable in nature, refused to compel the superior court to enter an order of non-suit or dismiss the case until the contempt was purged. Similarly, in *— ex rel. Harris v. Superior Court* (1927), 144 Wash. 229, following the *Hunter* case, this court held that a final decree of divorce need not be entered in favor of one in contempt in that divorce action.

Pike v. Pike (1946), 24 Wn. (2d) 735, is the only case cited by respondents where a motion for dismissal of appeal was involved. In a divorce action, the mother had been ordered to turn over the custody of her children to the father. The mother secreted the children and then appealed the order. This court first decided that an appeal from a *divorce* action could be dismissed. It then emphasized that appellant was affirmatively frustrating the order, and that the children's welfare would be best served by being in the custody of the father, as was determined in the superior court. Under these circumstances, this court directed dismissal of the appeal unless appellant complied with the custody order within ten days. This case involved an appeal from the very order of which the mother was in contempt.

The only other case relied upon by respondents, *Rutgers v. Walker* (1943), 19 Wn. (2d) 681, is not in point at all.

Respondents recognize that the rule invoked by them is one of equity, and applies only to cases in equity. It involves denial of affirmative equitable relief to one in contempt. It never involves denial of a defensive *legal* right. In effect, it is a particular example of the application of [fol. 33] the ancient equity maxim: "He who seeks equity must do equity."

Respondents' Motion Would Be Frivolous and Pointless

Appellant union's liability is that of a principal, for the acts of the agent, Harris (Appellant) done in the scope and course of his employment. This is not the case of liability of joint tort-feasors, but liability based upon the doctrine of respondeat superior. This means, therefore, that the liability of appellant Harris is a necessary prerequisite to the liability of appellant union. See: *Baremus v. Root* (1901), 23 Wash. 710, 716. See also: *Marshall v. Chapman's Estate* (1948), 31 Wn. (2d) 137, 146; *Ogilvie v. Hong* (1933), 175 Wash. 209, 215; and Mechem: *On Agency* (2d Ed.), sec. 2012.

There is nothing to justify dismissal of appellant Harris' appeal. Nor can the union's brief be stricken without also striking appellant Harris' brief. If Harris should prevail, the basis of the union's liability would be gone. Since this is the case, the dismissal of the union's appeal would actually accomplish nothing.

The Equities Urged Do Not Favor Respondents in the Present Case

The rule sought to be applied in this case is applicable only to proceedings in the same action. "The rule is limited to the proceedings in the case in which the contempt occurred." 17 C. J. S. P. 139 (Contempt, sec. 97). See: e. g., *Montgomery v. American Employers' Ins. Co.* (D. Del. 1938), 22 F. Supp. 476, affirmed 101 F. Second 1005; Cert. denied, 307 U. S. 629, 83 L. Ed. 1512. This is simply an expression of the general rule in equity that the doctrines of "doing equity" and "clean hands" apply only to the particular cause in dispute.

[fol. 34] Supplemental proceedings are a separate action or actions, although a judgment is ordinarily a precondition. See: *Hamburger Apparel Co. v. Werner* (1943), 17 Wn. (2d) 310.

This is stated in 21 Am. Jur., p. 314 (Executions, sec. 658):

> . . . The proceeding had been declared auxiliary to and a part of the original action in the sense that it takes the same number on the docket, but it is essentially a new

and independent action in the sense that it involves the determination of new and different issues, all of which are foreign to those in the original case. . . .

The distinction between the action, upon which this appeal is based, and the supplemental proceedings, from which the contempt arose, is further emphasized by the fact that the former is a strictly legal action, while the latter is essentially an action in equity. Appellants have done nothing in the main action which would justify the dismissal of their appeal in that action.

The rule applies only to affirmative equitable action, and not to matters of defense. Matters of right are not denied under the rule respondents seek to evoke. This appeal is from a judgment in an action at law. An appeal from a judgment at law is purely a matter of defense; it is not a matter of grace, nor an application for affirmative equitable relief. This distinction is fundamental. See: *Kelly v. Kelly* (1932), 258 NYS 367, 17 C. J. S. p. 139 (Contempt, sec. 97). We doubt that there is inherent power to deny a person in contempt the right to defend an action against him, for this would involve the taking of his property without due process of law, in violation of the Fourteenth Amendment. See: *Peters v. Berkeley* (1927), 219 NYS 709; *Maran vs. Maran* (1910), 122 NYS 9. The rule does not apply where the interest of more than the person in contempt would be involved.

Respondents seek not only to dismiss appellant union's appeal, or strike its brief, but they also want to deny appel- [fol. 35] lant Harris, his appellate remedies. This is improper, since appellant Harris is not in contempt. Further, to strike appellant union's brief would necessarily require the striking of appellant Harris' brief.

Appellant union is an unincorporated association, which may be made party to a suit by serving its officers. See: *St. Germain v. Bakery and C. Workers Union* (1917), 97 Wash. 282. The judgment against the union binds the joint assets of all its members. To dismiss the appeal is to prejudice the interests of those represented who are not in contempt of court. Faced with a clearly analogous situation involving a corporation, the New Mexico Supreme Court held that "where there are several defendants representing not only themselves, but other members of an

organization to which they belong, the court cannot strike out defenses standing for the benefit of all the defendants because some are in contempt." *Abbott v. Sherman Mines* (1937), 71 P. (2d) 1031, 41 N. M. 525. This reasoning is all the more applicable to the present case wherein the defendant is an unincorporated organization.

If respondents' position is followed to its logical conclusion, this court could, in effect, hold that a defendant who failed to supersede a money judgment against him could be compelled to satisfy the judgment. Any order in supplemental proceedings that the judgment debtor satisfy the judgment, is not complied with, could result in an adjudication of contempt. No matter how erroneous the judgment of contempt, such judgment would stand as a bar to any appeal from the money judgment. Respondents cite no authority for such a sweeping proposition.

It is respectfully submitted that respondents' motion should be denied in its entirety.

Accepted by —— ——, Attorneys for Respondents.

Respectfully submitted, John Caughlan, Attorney for Appellants.

[fols. 36-37] [File endorsement omitted.]

[fol. 38] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER ON MOTION TO DISMISS APPEAL—May 17, 1952

It appearing to this court that the appellant National Union of Marine Cooks & Stewards, a voluntary association, has been adjudged in contempt of the Superior Court of the State of Washington for King County by order made and entered by that Court in its Cause No. 411247, on the 4th day of April, 1952, and that said contemptuous conduct of said appellant frustrates the enforcement of the judg-

ment from which the present appeal has been taken to this Court, which judgment has not been superseded; and it further appearing to this Court that the National Union of Marine Cooks & Stewards, a voluntary association, has appealed to this Court from the said order of April 4, 1952,

Now, therefore, it is ordered and directed this 17th day of May, 1952:

1. That this appeal will not be heard on May 22, 1952, and it is stricken from the Court calendar for that day, and will not be heard until the said adjudication of contempt has been affirmed or reversed; unless the said appellant Union sooner purges itself of the contempt of which it is adjudged to be guilty by the said order of April 4, 1952.

[fol. 39] 2. That a ruling on the respondents' motion to dismiss the present appeal will be held in abeyance until the determination of the appeal in the contempt proceeding.

Matthew W. Hill, Acting Chief Justice; Joseph A. Mallery, Thomas E. Grady, Charles T. Donworth, Frank P. Weaver.

[fol. 40] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

SUPPLEMENTAL MOTION FOR DISMISSAL OF APPEAL—Filed May 29, 1952

Come now the respondents, renew their motion for dismissal of the appeal herein and, if said motion be denied or undetermined, respectfully move this Honorable Court for an order directing the appellant association to deliver to Wilbur Zundel, as its receiver, the United States Bonds mentioned in the order of the Superior Court in the above cause made and entered February 15, 1952; and directing the said Superior Court not to authorize any payment or distribution to creditors by said receiver until further order of this

Court; and dismissing the appeal now pending in this cause on a designated future date, unless in the meantime the said appellant delivers said bonds to said receiver and files in this Court evidence of such delivery.

This supplemental motion is based upon the records and files herein, the affidavit supporting the original and pending motion for dismissal of the appeal and upon the affidavit of John Geisness set forth below.

Bassett, Geisness & Vance, Attorneys for Respondents.

STATE OF WASHINGTON,
County of King, ss:

John Geisness, being first duly sworn, on oath deposes and says:

On the 19th day of May, 1952, this Court made an order [fols. 41-47] in the instant case striking this cause on the merits from the calendar and deferring disposition of respondents' motion to dismiss the appeal in the instant case until final determination of an appeal in a certain contempt proceeding.

Respondents filed a motion to dismiss the appeal in the contempt proceeding upon the ground that the appeal was not taken within the time allowed by law. Said motion will be noticed for hearing before this Court upon the same date as the motion and supplemental motion for dismissal of the appeal in the instant case are noticed for hearing.

John Geisness.

Subscribed and sworn to before me this 23rd day of May, 1952. J. Duane Vance, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 48] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

APPELLANTS' BRIEF IN OPPOSITION TO SUPPLEMENTAL MOTION FOR DISMISSAL OF APPEAL—Filed June 13, 1952

[Title omitted]

Introduction

The supplemental motion to dismiss appellants' appeal from judgment in the sum of $475,000 against them:

(i) Removes the motion for dismissal of appeal . . . and, if said motion be denied or undetermined . . .

(ii) Moves for an order directing [the appellant union] to deliver to Wilbur Zundel, as its receiver, the United States bonds mentioned in the order of the Superior Court in the above cause made and entered February 15, 1952; and

(iii) [Modifying the order of the superior court] by directing the said Superior Court not to authorize any payment or distribution to creditors by said receiver until further order of this court; and

(iv) Dismissing the appeal . . . unless [by a designated future date] the appellant delivers said bond to said receiver . . .

It is clear that respondents' position before this court is as follows:

(1) An ordinary money judgment may be enforced by contempt proceedings. (Respondents have an ordinary judgment for money. The bonds referred to in the order of February 15, 1952, never belonged to respondents. They were not the subject of the action.)

(2) An Appellant may be *required* to supersede a judgment, in full or in part, as a prerequisite to the hearing of his appeal. (Since respondents now specifically ask that the receiver hold funds paid to him, and that he not be authorized to distribute such funds to the judgment cred-

itors, pending determination of this appeal, it is obvious [fol. 49] that respondents are asking for a partial supersedeas as a precondition to the hearing of the appeal.)

(3) An appellant may be stripped of substantial *defensive* right by reason of an adjudication of contempt (i. e., failure to pay in cash to a receiver a substantial portion of the money judgment against the said appellant.

Certain other things are apparent from the motion now presented to the court. First, respondents desire to prevent appellant union from ever being able to appeal the contempt adjudication upon which respondents base their claim that the princial appeal should be dismissed. Second, they seek to invoke the coersive powers of the Supreme Court of the State of Washington in contempt proceedings without affording appellants a hearing. It is a matter of doubt whether appellants had the bonds described in the order of February 15th, 1952, at the time that order was made, or for many months prior to that time. Therefore, an order of this court directing the transfer of such bonds to a receiver, and preconditioning the hearing of the appeal upon such transfer, would strip appellants of a substantial defensive right without notice or hearing.

The Motion to Dismiss Should Be Denied and the Appeal Should Be Recalendared for Hearing on the Merits

(a) The granting of respondents' motion would deprive appellants of property without due process of law, and would deny to them the equal protection of the law.

Respondents state:

> **"Our supplemental motion in this case renews the original motion to dismiss the appeal, on the assumption that the appeal from the contempt adjudication will be dismissed."**

[fol. 50] If respondents' theory is correct, appellants are to be denied an appeal because the adjudication of contempt will never become final. The adjudication will (on respondents' theory,) never become final because respondents will gladly "trade" any possible "coercion" offered

thereby the superior court for dismissal of appellants' appeal in the main action without a hearing!

Respondents state that they desire "to obviate the necessity of a long delay pending appeal from the adjudication of "contempt," and "it seems . . . that there is no necessity to argue further appellants' contempt even if the appeal is not dismissed." Stated otherwise, respondents will gladly allow the Supreme Court to enter judgment against appellants, ordering appellants to turn over $298,000,000, and prejudging them to be in contempt upon their failure to do so, without a hearing on such contempt adjudication.

Respondents' contention is that the Supreme Court should strike appellants' appeal from the judgment of $475,000,000 against them, because appellant union has been adjudged guilty of contempt in superior court. Then, respondents contend, without inquiring as to whether there was jurisdiction or justification for the superior court adjudication, this court should enter its own coersive order in contempt proceedings without receiving any evidence, or conducting any hearing—without even making a determination as to whether the bonds to be transferred are, or have been, at any time material to this proceeding, in the possession or control of either of appellants. Such action, if pursued by this court, would deprive appellants of property without due process of law, and deny them equal protection of the law: *Hovey* v. *Elliott*, (1896) 167 U. S. 407, 17 S. Ct. 841, 43 L. ed. 215.

(b) Defensive *Right*, as distinguished from a privilege, may not be denied because of the contumacy of a [fol. 51] party

In support of their renewed motion to dismiss, respondents cite two cases to justify their position: *Hammond Packing Co.* v. *Arkansas* (1908) 212 U. S. 322, 29 S. Ct. 370, 53 L. ed. 530; and *Lawson* v. *Black Diamond Coal Mining Co.* (1906) 44 Wash. 26. The *Hammond* opinion was written by Mr. Justice White, who also wrote the opinion in *Hovey* v. *Elliot*, supra, 167 U.S. 407, cited by appellant in oral argument on May 16, 1952. The *Hovey* case holds that it is a deprivation of property without due process to withhold a defensive right from a party as punishment for his contempt. The *Hammond* case recognized that rule, but de-

cided that *suppression of material evidence* by a party may constitutionally be treated as a default. It is *not* a punishment for contempt. Immediately following the language which respondents quote from the *Hammond* case, Justice White said:

> "In its ultimate conception, therefore, the power exerted below was like the authority to default . . . because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering . . . ."

The justice cites the *Lawson* case with approval, recognizing the distinction between the situations involved in the *Hovey* and *Hammond* cases.

This court stated in the *Lawson* case, after discussing the right to dismiss under the appropriate statute, at 32:

> "But, if there are numerous issues in a case, and a discovery is sought only as to one of these issues, the striking of the answer and taking of judgment on all the issues . . . can only be justified on the theory that the judgment is given as a punishment . . . and it may well be doubted whether such a proceeding can be sustained under the authorities above cited." [which included the *Hovey* case.]

This distinction was again emphasized in the recent case of *Duell v. Duell* (CADC 1949), 178 F. (2d) 683, 14 ALR (2d) 560, at 566. The annotation to the *Duell* case collects all [fol. 52] the cases and demonstrates beyond doubt that the *Hovey* case still represents rule. (See particularly, 14 ALR (2d) at p. 586-593).

(c) The statutory method of coercion is exclusive. This court, in *In re Coulter* (1901), 25 Wash. 526, stated a well recognized rule at 528-529:

> "While the power to punish for contempt is inherent in all courts . . . it is . . . in its nature, arbitrary, capable of abuse . . . While the legislature may not lawfully take away this power altogether, it can, undoubtedly, to prevent its abuse, and to preserve the just rights of the individual, reasonably limit its exercise; that is to say, *it can* declare what acts or omis-

> sions shall constitute contempt, *define the character, and limit the amount of punishment that may be inflicted. . . . the statute is imperative.* (emphasis supplied.)

This rule is one of long standing in this state. Contempt actions must be brought in the precise manner prescribed by statute. A court cannot suspend an attorney from the practice of law, for example, or require him to apologize for statements made to the court: *State ex rel Martin v. Pendergast* (1905) 39 Wash. 132. Except as to contempt committed within the immediate view and presence of the court, the legislature has directed that the contemnor "be punished *as provided in this chapter.*" (emphasis supplied) (RCW 7.20.090)

The Judge may prescribe punishments for contempts committed within the immediate view and presence of the court, but for all other contempts, including that involved here, punishment is limited to the methods provided by statute. A careful study of the statutory provisions will reveal that dismissal of an appeal is not one of the modes of punishment prescribed.

The seemingly contrary result reached in *Pike v. Pike* (1946) 24 Wn. (2d) 735 is clearly explained by the court's language in that case, at 742:

> "The reason upon which the rule in criminal appeals is founded [that such appeals will be dismissed where the prisoner has escaped from custody] applies in the instant case. Due to the contumacy [of appellant] . . . that portion of the decree relative to the care, [fol. 53] control, and custody of the children cannot be executed."

Thus, the particular act of contumacy involved in this case (secreting the children whose custody was the subject matter of the appeal) deprived the court of *power to make effective disposition of the case.* Its judgment on appeal would be rendered nugatory unless the children were brought out of hiding.

Respondents Are Attempting to Impose a Partial Supersedeas (More Than ⅔ of a Judgment Totalling $475,000) as a Condition for the Right of Appeal.

To supersede the judgment in this case, appellants would have to post a bond of $950,000. (Appellant union consists of only 6,000 members altogether. Appellant Harris is an individual member of the union.)

Having failed to supersede, appellants were undoubtedly subject to the levy of execution by respondents, and to the institution of proceedings supplemental thereto. Virtually all property of appellant union is situated in California. That state is required to give full faith and credit to judgments of the State of Washington under Article IV, Section 1, of the United States Constitution. Thus, respondents have, and have had, a full, complete and adequate remedy at law, which they have failed to pursue.

No evidence was ever received that appellant union actually owned, or controlled bonds or other assets in the amount or of the kind described in the order of February 15, 1952. The only evidence was a financial report indicating that at some time during the previous fall the union had had bonds in that amount.

The purpose of supplemental proceedings is to discover and apply assets of the judgment debtor to the satisfaction of the judgment. Until the present motion of respondents, the supplemental proceedings have properly been attempts [fol. 54] at execution. Now respondents ask this court to enter an order "directing the Superior Court not to authorize any payment or distribution to creditors by the receiver until further order of this Court." The essence of the supplemental proceedings would be lost. The *supposed* assets are not to be applied to the judgment. The bonds would become, in effect, a partial supersedeas. The only difference between the proposed order and a supersedeas would be (1) the receiver, instead of the Clerk of the Court, would hold the bonds; and (2) the amount posted would be $298,000, instead of $950,000.

By requesting this, respondents are asking this court to require appellant union to choose between abandoning their legal right of appeal, or accepting an unprecedented condition for an appeal, not warranted by statute or rule of

court. Since appellant union alone must meet this new condition, or abandon its right of appeal, it, and appellant Harris, are denied the equal protection of the laws.

Respondents request this court to make an *ad hoc* amendment to its rules, and to the statute granting all parties an appeal in the mode prescribed by the court rules.

This Court Should Refuse to Enter Any of the Supplemental Orders Requested by Respondents

(a) These motions are inconsistent with respondents' motion to dismiss Cause No. 32180, for the reasons discussed in the brief submitted this day in that cause.

(b) Appellant union has not been properly served. Appellants, for Cause No. 32180, are before this Court. This does not mean, however, that respondents have met the jurisdictional prerequisites for evoking the additional process of this court.

Respondents rely entirely upon *Pike v. Pike*, supra, (1946) 24 Wn. (2d) 735 for their claim that the appellant union is [fol. 55] before this court, and may be ordered to turn over the bonds described in the order of the Superior Court.

The *Pike* case held that, pending appeal, service of process upon counsel for the appellant, was adequate service upon appellant. In the present case, however, counsel served while representing the union generally in the main appeal, have never had authority to represent appellant union in the supplemental proceedings, except to appear specially. While the requested orders are made in a motion under Cause No. 31984, the subject matter of the orders is based upon the jurisdiction of this court in Cause No. 32180.

It is submitted, therefore, that unless the appellant union is properly served, this court lacks jurisdiction of the person of the association to order it to do as requested by respondents.

Conclusion

In Re Van Alstine (1899) 21 Wash. 194, quoted the following with approval at 200:

> "No jurisdiction to compel the payment of an ordinary money demand, unconnected with such peculiar

equities, ever exested in chancery courts, nor had they the power to compel such payments by punishing the refusal to pay under the guise of contempt."

The Court concluded that:

". . . the superior court . . . was without power to require the petitioners to pay into court the money decreed to be due the defendant, and to enforce its payment by imprisonment."

In the *Van Alstine* case imprisonment was the punishment sought to coerce payment of a money judgment. Here, the punishment is the stripping of appellant of his right to appeal, and compelling him to accept the judgment of the superior court.

The punishments differ, but the principle is the same. In neither case does the court have the power to engraft a new punishment for contempt on the punishments prescribed by the legislature.

[fol. 56] The motions of respondents should be denied, and the case recalendared for hearing on appeal.

Respectfully submitted, John Caughlan, Siegfried Hesse, John F. Walthew, on behalf of counsel for Appellants.

[fols. 57-60] In Supreme Court of Washington

Excerpt from Motion Docket

Date, June 13th, 1952. Department 1

Title of Action: No. 31984. (2). George Arnold, et al., Respondents., vs. Nat'l Union of Marine Cooks & Stewards Assn. et al., Appellants.

Attorneys: Bassett, Geisness & Vance. Walthew, Gershon, Oseran & Warner, John Caughlan.

Motion and Supplemental Motion for Dismissal of Appeal. Held in Abeyance. E. W. Schwellenbach, C. J. Jun. 13, 1952.

[fol. 61] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

MOTION FOR LEAVE TO FILE AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS APPEAL—Filed May 1, 1953

Come now the respondents in the above entitled cause and move the court for leave to file the affidavit of H. J. Schuchard in further support of respondents' motion to dismiss the above appeal. A copy of said proposed affidavit is attached hereto.

Bassett, Geisness & Vance, Attorneys for Respondents.

[File endorsement omitted.]

[fol. 62] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

AFFIDAVIT OF H. J. SCHUCHARD IN SUPPORT OF MOTION TO DISMISS APPEAL

STATE OF WASHINGTON,
County of King, ss:

H. J. Schuchard, being first duly sworn, on oath deposes and says:

Affiant is one of the respondents in the above entitled cause.

Affiant has seen a copy of the "Voice", a newspaper published by the appellant National Union of Marine Cooks & Stewards Association, dated March 13, 1953. On page two of said newspaper is published a financial report of said appellant for the period from December 27, 1951, to December 31, 1952, which said report shows total receipts of $413,280.90, and total disbursements of $633,391.10, and shows total cash assets at the end of said period of only $90,389.84.

Affiant further alleges that by common report upon the waterfront of the City of Seattle a new union will shortly commence a "raid" upon said appellant union with the support and cooperation of the officers of said appellant union so that the members of the appellant union will become members of said new union. Affiant is informed and believes that said report is likewise a common report in San Francisco, California, and in other Pacific Coast ports. Affiant is also informed and believes that at a meeting of appellant union April 16, 1953, or April 23, 1953, Robert [fols. 63-64] (Bob) Ward, General Agent in Seattle for the appellant union ("Port Agent") stated to the members present, in substance, that the officers of appellant union had said before and still said that respondents would never collect any money from appellant union, although it would be necessary to "pick up the pieces" in a new union.

H. J. Schuchard.

Subscribed and sworn to before me this 29th day of April, 1953. John Geisness, Notary Public in and for the State of Washington, residing at Seattle.

[fol. 65] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 31984

[Title omitted]

AFFIDAVIT OF H. J. SCHUCHARD IN SUPPORT OF MOTION TO DISMISS APPEAL—Filed May 27, 1953

STATE OF WASHINGTON,
County of King, ss:

H. J. Schuchard, being first duly sworn, on oath deposes and says:

Affiant is one of the respondents in the above entitled cause.

Affiant has seen a copy of the "Voice", a newspaper published by the appellant National Union of Marine Cooks &

Stewards Association, dated March 13, 1953. On page two of said newspaper is published a financial report of said appellant for the period from December 27, 1951, to December 31, 1952, which said report shows total receipts of $413,280.90, and total disbursements of $633,391.10, and shows total cash assets at the end of said period of only $90,389.84.

Affiant further alleges that by common report upon the waterfront of the City of Seattle a new union will shortly commence a "raid" upon said appellant union with the support and cooperation of the officers of said appellant union so that the members of the appellant union will become members of said new union. Affiant is informed and believes that said report is likewise a common report in San Francisco, California, and in other Pacific Coast ports. Affiant is also informed and believes that at a meeting of appellant union April 16, 1953, or April 23, 1953, Robert [fols. 66-71] (Bob) Ward, General Agent in Seattle for the appellant union ("Port Agent") stated to the members present, in substance, that the officers of appellant union had said before and still said that respondents would never collect any money from appellant union, although it would be necessary to "pick up the pieces" in a new union.

Mr. Henry J. Schuchard.

Subscribed and sworn to before me this 29 day of April, 1953. John Geisness, Notary Public in and for the State of Washington, residing at Seattle.

Copy Received. Date, 4-30-53. Firm, Caughlan & Hesse. By V. Bazant.

Received Apr. 29, 1953. Walthew, Gershon, Oseran & Warner.

ZT

[fol. 72] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 31,984

[Title omitted]

AFFIDAVIT OF ROBERT WARD IN OPPOSITION TO RESPONDENTS' MOTION FOR LEAVE TO FILE ADDITIONAL AFFIDAVIT—Filed May 22, 1953

STATE OF WASHINGTON,
County of King, ss:

Robert Ward, being first duly sworn, on his oath deposes and says:

I am the Seattle Port Agent of the National Union of Marine Cooks & Stewards Association, one of appellants herein, and make this affidavit in opposition to respondents' motion for leave to file the additional affidavit of H. J. Schuchard, in support of their motion to dismiss the within appeal.

I am familiar with the workings and operations of appellant Union, and I am familiar with the financial statement referred to by affiant Schuchard. The figures cited by the affiant Schuchard relating to the receipts and disbursements of the Union for the year 1952 are true; the financial report further discloses, however, that the principal disbursement (in the sum of $241,531.31) for the period encompassed, and which is responsible for the deficit for that year, is for "education, publicity, newspaper, legal, accounting, research, legislative, S. U. P. raid, NLRB, etc." The other disbursements are all the usual disbursements [fol. 73] of the appellant Union. The necessity of the disbursement above specified was necessitated by the relentless and extreme attacks upon appellant Union emanating from the Sailors Union of the Pacific, and its continuous attempts to supplant the appellant Union as the collective bargaining agent for the stewards department upon the West Coast ships. This not only includes the costs of the within action, and the companion case, #32180, but also includes numer-

ous NLRB petitions, hearings, and the like. Further, in order to defend itself, the appellant Union has, of necessity, been obligated to undertake an extremely massive and expensive educational and publicity campaign among its members.

With regard to the remainder of the affidavit of H. J. Schuchard, and on the basis of the information which I have received as Seattle Port Agent, I must categorically deny any allegations or inferences that the appellant Union is seeking to dissipate its assets. Appellant Union has sought aid from all maritime unions, who will assist it in maintaining appellant's collective bargaining rights; such assistance is, in no manner whatsoever, related to or motivated by any attempt to dissipate or disburse any assets of the appellant Union.

Further, I never made the statement referred to by affiant Schuchard. I have examined the minutes of both April 16, 1953 and April 23, 1953, and no such statement in substance, or in specific language, appears therein. [fols. 74-78] Finally, upon the basis of official communications received from the national officers of the appellant Union, I have been informed that the respondents herein have brought action, and are presently engaged in protecting their interests in any assets which the appellant Union has. All of the principal assets of the Union are located in San Francisco, California, and it is there that respondents are pursuing their remedies pursuant to the procedural and substantive rights guaranteed them by the laws of the State of California.

Robert Ward.

Subscribed and sworn to before me this 21st day of May, 1953. John Caughlan, Notary Public for the state of Washington residing in Seattle. (Notarial Seal.)

[fol. 79] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

No. 31,984

[Title omitted]

MOTION TO DOCKET THE APPEAL OF JOSEPH HARRIS FOR HEARING—Filed June 11, 1953

Comes now the appellant, Joseph Harris, by and through his attorneys, the undersigned, and hereby moves the above entitled court for an order docketing his appeal and setting the same for oral argument as soon as is practicable. This motion is based upon the files and records herein, upon the affidavit of Joseph Harris attached hereto and made a part hereof, and upon the brief being submitted herewith.

John Caughlan, Siegfried Hesse, Attorneys for Appellant, Joseph Harris.

STATE OF WASHINGTON,
County of King, ss:

Joseph Harris, being first duly sworn, on his oath deposes and says: I am one of the appellants in the above entitled cause, and make this affidavit in support of my motion for the separate docketing and hearing of my appeal.

[fol. 80] On the 5th day of September, 1951, a judgment was entered against me, in my individual capacity, in the sum of $475,000.00. Notice of appeal was timely filed and my appeal was otherwise perfected.

On September 5, 1951, another judgment was also entered against the National Union of Marine Cooks and Stewards from which it took an appeal. The union's appeal and mine were joined together solely for the convenience of court and counsel since both judgments appealed from were rendered at the same trial and were based upon one set of findings of fact and conclusions of laws. However it must be remembered that there were two separate judgments and two separate appeals. In this motion I am concerned with the individual judgment against me and the fate of my own personal appeal.

Both appeals were originally set for oral argument on May 22, 1952. Prior to that date, however, it appears that the appellant union was adjudged in contempt by the Superior Court for its refusal to comply with an order issued in proceedings supplemental to the judgment of September 5, 1951. I was not involved in those proceedings at all.

Based upon that adjudication, the respondents served upon my attorneys on April 17, 1952, a motion to dismiss my appeal. This motion was resisted, and, on May 17, 1952, after hearing oral argument on this motion, this court struck from the calendar the hearing on both my appeal [fol. 81] and the appeal of the appellant union, reserving action on the motion to dismiss the appeals until determination of the appellant union's appeal from the adjudication of contempt heretofore mentioned. Although I personally have done nothing to justify dismissal of my appeal, action upon my appeal has been held in abeyance ever since.

On May 26, 1953, this court filed an opinion in Cause No. 32180, to which I am not and never have been a party, in which it affirmed the adjudication that the appellant union was in contempt of court. That opinion concludes with the following language:

> "The adjudication of contempt is affirmed, and the appeal presently pending in the main action shall be dismissed unless, within fifteen days from the date of the remittitur herein, the appellant union purges itself of the order of contempt, by complying with the trial court's order requiring delivery of the bonds to the receiver."

As has been pointed out above there are two separate appeals "in the main action," one of which, my own, is not in any way involved in the contempt proceeding.

Respondents' motion to dismiss seems directed indiscriminately at both my appeal and the appeal of the appellant union, although respondents never undertook supplementary proceedings against me. Furthermore, the court's language quoted above ("the appeal . . . in the main action") is ambiguous. I am therefore presenting this motion to clarify my status as a litigant before this court.

[fols. 82-85] It seems obvious that the court did not intend to dismiss my appeal, for, I have not violated or disobeyed any court orders, and the respondents have never asserted that I have conducted myself in any manner whatsoever that would justify the dismissal of my separate appeal.

For almost two years I have had outstanding against me a judgment in the sum of $475,000.00. This judgment I respectfully submit should be, and will be, upon the hearing of the merits, reversed as contrary both to the facts and the applicable law. In the meantime, however, it subjects me to the garnishment of my wages, the attachment of my property and other potential harrassment. It is for these reasons that I am extremely anxious to have my appeal heard upon the merits in order that I may have this judgment of $475,000.00 reversed.

I therefore respectfully urge that this court docket my appeal for oral argument forthwith, irrespective of whatever action this court may deem fit and proper with regard to the appeal of the other appellant.

Joseph Harris.

Subscribed and sworn to before me this 10th day of June, 1953. John Caughlan, Notary Public for the state of Washington residing at Seattle. (Notarial Seal.)

[fols. 86-87] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

MOTION TO DOCKET APPEAL FOR ARGUMENT, OR IN THE ALTERNATIVE TO STAY PROPOSED DISMISSAL OF APPEAL—Filed June 11, 1953

Comes now appellant union, and moves the above entitled court for an order docketing the above entitled appeal for argument, or, in the event said motion is denied, for an order staying the proposed dismissal of said appeal.

This motion is based upon all the files and records herein

and in case numbered 32180, in the files of the above entitled court, and upon the brief being submitted herewith.

Walthew, Oseran & Warner, Attorneys for Appellant Union.

[File endorsement omitted.]

[fol. 88] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

BRIEF IN SUPPORT OF MOTION TO DOCKET APPEAL FOR ARGUMENT, OR IN THE ALTERNATIVE, TO STAY PROPOSED DISMISSAL OF APPEAL—Filed June 11, 1953

This is the only motion which appellant union is filing in this case. All of the other motions that appellant union is this day filing are being filed in Case No. 32180. This appellant's reference in this motion and brief to Case No. 32180 and to the records in that case, is not to be deemed a waiver of the point that appellant makes in that case (as it does in this) that this court had no authority in that case to make any order effecting appellant's rights in this one. The reference is simply for convenience and in order to avoid the necessity of setting out at length here again matters already known to this court by virtue of their presence in the files of another case.

As pointed out in the briefs filed in support of the various motions this date being filed in Case No. 32180, the judgment in that case is far from final. Appellant in that case has at least two more steps which are legally open to it—a petition for rehearing here and an application to the Supreme Court of the United States for certiorari—before the judgment in that case becomes final. Certainly, therefore, to the extent that this court proposes to predicate an order in this case upon a failure to comply with a condition in that one, this court should defer action here until its judgment there is final. Furthermore, as is in the aforesaid briefs also pointed out, this court has no authority to act in this case [fol. 89] without notice and hearing to appellant here; the

submission in the other case did not embrace the issue of the disposition of the appeal in this one. Finally, as is in those same briefs pointed out, this court has no authority to punish a contempt by the dismissal of an appeal. Such punishment is precluded by the statutes of this state and does not exist at common law.

In addition to the foregoing, the record before the court in this case—including the briefs on file herein—shows that appellant has valid and meritorious grounds of appeals, that the judgment below in this case is clearly in error and must be reversed. (It may be observed parenthetically that respondents' efforts to get the appeal here dismissed demonstrate that respondents recognize the impregnability of appellant's position on this appeal and are afraid to have this court pass on the merits of the appeal). This court therefore ought not, in the face of the total lack of authority for its proposed action, deny to appellant its right to be heard here on the merits. To do so is to deny to appellant due process of law. *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215.

Furthermore, this case is simply one in which a respondent has an unsatisfied money judgment. It is nothing more. If this appeal can be dismissed because appellant has not superseded that judgment, then any appeal can be so dismissed. All a successful plaintiff need do, is follow the course taken by respondents here and no appeal would be safe from dismissal in this court. This court has never held in any other case that an appeal of a judgment debtor will be dismissed when he has not superseded the judgment or partially satisfied it pursuant to an order of the court from which the appeal is taken. We do not understand this court to be enunciating such a sweeping rule now. Such a rule would destroy the statutory right to an appeal— and only the Legislature can do that. Yet, that would be the effect [fol. 90] of the dismissal of the appeal here, if a general rule of law is being established in this case.

If, on the other hand, the rule is to apply only to this judgment debtor, then this would be a clear denial of the equal protection of the laws which the federal constitution guarantees to this appellant. That this appellant is a trade union which, at the moment, may or may not enjoy popu-

larity with the members of this court is beside the point. That fact affords no basis for treating appellant differently from any other litigant before this court.

For these reasons, the appeal here should not be dismissed. This court should forthrightly face up the issues posed by the appeal on its merits. We are confident, that if it does, the judgment below will be reversed and the whole sorry story of this litigation brought to an end.

We pray that the court docket the appeal for argument on its merits at the earliest possible opportunity.

Respectfully submitted, Walthew, Oseran & Warner, Attorneys for Appellant Union.

[File endorsement omitted.]

[fol. 91] In the Supreme Court of the State of Washington

[Title omitted]

Motion to Dismiss—Filed June 12, 195.

Comes now the respondents in the above-entitled cause and move the Court that the appeal now pending from a judgment of the Superior Court made and entered September 5, 1951, be dismissed, with prejudice, in accordance with the opinion and order of this Court dated May 26, 1953, for the reason that appellants have altogether failed to purge the appellant union of its contempt within fifteen (15) days from the date of the remittitur in cause No. 32180, records and files of this Court, and respondents further move that the remittitur go down forthwith.

This motion is based upon the records and files herein and upon the affidavit of counsel for respondents hereto attached.

Bassett, Geisness & Vance, Attorneys for Respondents.

[File endorsement omitted.]

[fol. 92] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

Samuel B. Bassett, being first duly sworn, upon oath, deposes and says:

Affiant is one of the attorneys for respondents in the above-entitled cause and upon the above-numbered appeal.

The appellants have altogether failed to deposit Government bonds in the amount of $298,000.00, or any other securities, money, or other property with the receiver appointed by the Superior Court of the State of Washington, and have not, in whole or in part, purged themselves of the contempt mentioned in the opinion and order entered upon the appeal to this Court in the above-entitled cause, under number 32180. In said cause number 32180, before this Court, the remittitur went down May 26, 1953, and has never been recalled.

An emergency exists because the appellant union is rapidly dissipating its assets. On September 26, 1951, said appellant owned cash and liquid securities in the approximate amount of $360,011.58, according to its own financial report. According to a report published by said appellant under date of March 13, 1953, said appellant, during 1952, expended approximately $238,000.00 more than it received and its "cash assets" (broadly described in said report as "cash, investments, etc.") amounted to only $90,389.00 at the end of 1952. All of its assets of substantial value are in [fols. 93-96] California and two California courts have refused to entertain suit on the Washington judgment while this appeal is pending. The other appellant has no known assets and certainly has no assets of material value in relation to the amount of the judgment herein. Nothing whatsoever, has been paid upon said judgment.

Samuel B. Bassett.

Subscribed and sworn to before me this 12 day of June, 1953. John Geisness, Notary Public in and for the State of Washington, Residing at Seattle.

[File endorsement omitted.]

[fol. 97] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

BRIEF OF RESPONDENTS UPON PENDING MOTIONS

The following motions are pending before the court and are noticed for hearing June 26:

(1) Respondents' motion to dismiss appeal;
(2) Appellants' motion to docket appeal for argument or, in the alternative, to stay proposed dismissal of appeal; and
(3) Motion to docket the appeal of Joseph Harris for hearing.

These motions will be discussed in the above order.

(1) Respondents' Motion to Dismiss Appeal:

This motion, supported by affidavit, asks that the appeal in the above case be dismissed and the remittitur sent down immediately.

On May 25, 1953, an opinion was filed by this court in Cause No. 32180, (Arnold v. National Union of Marine Cooks and Stewards Association, 142 Wn. Dec. 590) which concluded:

> "The adjudication of contempt is affirmed, and the appeal presently pending in the main action shall be dismissed, unless, within fifteen days from the date of the remittitur herein, the appellant union purges itself of the order of contempt, by complying with the trial court's order requiring delivery of the bonds to the receiver."

No. 32180 is an appeal from adjudication of contempt entered in supplemental proceedings to enforce the judgment from which the appeal in 31984 is taken. The affidavit filed in support of respondents' motion to dismiss the appeal shows that the appellant union has failed to purge itself of the contempt and that more than fifteen days have expired [fol. 98] from the date of the remittitur.

The affidavit filed in support of the motion to dismiss

clearly shows that an emergency exists. According to its own records and reports, the appellant union depleted its cash and liquid securities from $360,011.58 in September, 1951 to $90,389.00 at the end of 1952. The judgment of respondents is for the total sum of $475,000.00. This judgment is wholly unsatisfied. Two California courts have refused to entertain suits on the Washington judgment while the appeal is pending to this court. The other appellant, Harris, has no assets of material value in relation to the amount of the judgment herein. An affidavit filed by respondents in No. 31984 indicates the organization of a new union to displace the appellant union.

In short, directly contrary to the earlier protestations of the appellant union, through its counsel, there has been in operation a scheme to dissipate completely the assets of the appellant union and then to allow it to be displaced by a "new" organization. The effectuation of this scheme has required contemptuous disregard of the order of the superior court that bonds of the appellant union be delivered to the court-appointed receiver. We respectfully submit that the judgment of dismissal should become final at the earliest possible date, pursuant to Rule 15 of the Rules Peculiar to the Business of the Supreme Court. In recognition of the emergency, the court, in No. 32180, entered an order that the remittitur go down immediately, and the same emergency exists as to the present motion for an order dismissing the main appeal.

(2) Appellants' Motion to Docket Appeal for Argument or, in the Alternative, to Stay Proposed Dismissal of Appeal.

This motion is simply a request that the court accord the appellant more time in which to effectuate fully its contemptuous scheme. The appellant union speaks of its constitutional rights, but it has no constitutional right to emasculate the judicial system. The courts of this state [fol. 99] have inherent authority to protect themselves against impairment of their powers to discharge their duties as constitutional courts. *Blanchard v. Golden Age Brewing Company*, 164 Wash. 140, 2 P. (2d) 79. Courts have inherent power to effectuate their judgments. *14 Am. Jur.* 370, Section 171; *14 Am. Jur.* 373, Section 174.

The appellant union demands due process of law. The due process clause was not intended as a weapon to subvert the judicial process, but the broad issue thus suggested need not be argued because "due process does not comprehend the right of appeal". *District of Columbia v. Clauans 300 U.S. 618, 81 L. Ed. 843, 847.*

12 Am. Jur. 328, Section 638;
Reetz v. Michigan, 188 U.S. 405, 47 L. Ed. 563;
Pittsburgh C.C. & St. Louis RR. Co. v. Backus, 154 U.S. 421, 38 L. Ed. 1031.
McKane v. Durston, 153 U.S. 684, 38 L. Ed. 867.

In *Hovey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215, upon which appellants base their constitutional claim, the Supreme Court of the United States expressly pointed out (L. Ed. p. 230) that its decision was not applicable to a case such as the instant case:

> "Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit. The right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt involved an essential element of due process of law, and our opinion is therefore exclusively confined to the case before us."

Even if the due process clause were applicable, the conduct of the appellant union operates as a conclusive admission that the appeal is without merit. As we have pointed out in our brief on the pending motion in No. 32,80, an admission of this sort may be given full effect without violence to the due process clause, even where the result is to deny a hearing altogether.

[fol. 100] *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 53 L. Ed. 530 (1909);
Lawson v. Black Diamond Coal Mining Co., 44 Wash. 26 (1906).

Appellants suggest that respondents' motion to dismiss the appeal is an admission that the judgment is not sustainable. This is absolutely groundless, because we long ago suggested that the bonds be held by the receiver pending the outcome of the appeal, (Respondents' Brief in Support of Supplemental Motion for Dismissal of Appeal, filed June 10, 1952) and have been at all times perfectly willing to proceed with the appeal if appellant complies with the order of the court requiring delivery of the bonds to the receiver. Our motion evidences an interest in stopping the dissipation of assets during an appeal in which appellant itself has no confidence. Obviously, appellant thinks very little of its appeal or it would not consider it necessary to flaunt the court's order and dissipate a substantial treasury to forestall collection of the judgment.

It is argued that, if the court is consistent in other cases, the effect of dismissing this appeal will be to require supersedeas, or partial satisfaction of judgment, in all cases as a condition of appeal, and "destroy the statutory right of appeal". From this gratuitous assumption appellant moves to an intimation that the court may discriminate against appellant by reason of prejudice on the part of the court (last page of Brief in Support of Motion to Docket Appeal for Argument, or in the Alternative, to Stay Proposed Dismissal of Appeal). This suggestion is in itself a contempt of this court, aggravated by the fact that the insinuation is built up from the gratuitous assumption hereinabove mentioned, which casts doubt upon the sincerity of the aspersion. Neither respondents nor the court have suggested that appellants be required to supersede, or partially satisfy the judgment, as a condition of appeal. Respondents, the trial court, and this court in No. 32180, have simply [fol. 101] treated appellant as subject to ordinary procedures for enforcement of the judgment in the absence of supersedeas. And in this it is treated as all judgment debtors. The union forfeits the appeal through *contempt*, not for mere failure to supersede or satisfy the judgment.

In No. 32180 appellant claimed a special immunity because it is a voluntary association, and this special immunity was denied. This court has taken the only possible effective action to terminate a travesty in which appellant is appeal-

ing on the one hand and, *in contempt of court*, dissipating its assets to render itself judgment proof on the other hand. The remarkable complaint is now raised that this court is destroying the right of appeal.

(3) Motion to Docket the Appeal of Joseph Harris for Hearing:

In the affidavit supporting this motion it is alleged that there are "two separate appeals". This is not true. There was one notice of appeal, one bond and one brief of appellants. The statutes (R.C.W. 4.88.040) provides that all parties whose interests are similarly affected by a judgment may join in a notice of appeal or may serve independent notices of appeal. The appellants chose to engage in a single joint appeal. Since Harris has voluntarily chosen to associate himself in a joint appeal he cannot now claim the rights of an independent and separate appellant, but must accept his co-appellant for better or worse. He is bound by statements made by his co-appellant in appellants' brief and by other statements and conduct affecting the single appeal.

The interdependence of the appellants was recognized by the appellants in "Answering Brief of Appellants upon Motion for Dismissal of Appeal", served upon respondents herein May 15, 1952, and filed with this court. Appellants there said "Nor can the union's brief be stricken (alternative relief asked by respondents) without also striking appellant Harris' brief". However, this does not mean that [fol. 102] the union's brief can not be stricken, but means, instead, that if the brief is stricken or the single appeal dismissed, there is no brief and there is no appeal.

We ask the court to bear in mind that the judgment against Harris, as hereinabove indicated, is not in itself a matter of importance to respondents. As far as respondents are concerned, the judgment below may be vacated as to him and the cause dismissed as to him, provided the judgment against the union is not impaired. So that there may be no question as to the respondents' good faith in making this statement, they now expressly consent to the entry of a final order by this court dismissing the appeal, directing that the judgment below be vacated as to Harris and the cause dismissed, without prejudice, as to him, and adjudging that

such vacation and dismissal shall not impair the judgment as to the appellant union, which shall remain in full force and effect. This would put each appellant in the position he would find himself if the union had been sued alone.

The important thing is that appellant union be precluded from using the procedures of this court, forbidden to it, through the device of using Harris in its stead. Such a use of Harris was suggested in the brief of appellants hereinabove mentioned, served upon respondents May 15, 1952, where appellants said:

> "If Harris should prevail, the basis of the union's liability would be gone. Since this is the case, the dismissal of the union's appeal would actually accomplish nothing."

Should Harris, contrary to our contention, be allowed to proceed as though he in fact had taken a separate appeal, we ask that stringent provision be made so there may be no possibility that the appellant union can use him as an instrument through which it may pursue an appeal forbidden to it. For this purpose, and so that there may be no further question as to the finality of the judgment below, we suggest that this be accomplished by provision in the order and [fols. 103-105] judgment of the court that the judgment against the appellant union is final and that no further proceedings in the cause by the co-appellant Harris shall enure to the benefit of the union.

Conclusion

It is desirable, and timely, we think, to discourage the practice of perverting constitutional and other legal guarantees to stultify the courts and tread rough-shod over the rights of other parties. Such results certainly were not contemplated by the authors of the Constitution and tend to diminish respect for our judicial system and laws.

Respectfully submitted, Bassett, Geisness & Vance,
Attorneys for Respondents.

[fol. 106] In Supreme Court of Washington

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Motion Docket Entries

Date, Friday, June 26, 1953. Department II.

Title of Action: No. 31984. (4). George Arnold, et al., respondents vs. Nat'l Union Marine Cooks—Joseph Harris, Appellants.

Attorneys: Bassett, Geisness & Vance. John Caughlan, Siegfried Hesse (For Harris).

Motion to Docket Appeal of Joseph Harris for Hearing. June 27, 1953. Granted, Grady, C. J.

Supreme Court, Motion Docket, 149

Date, Friday, June 26, 1953. Department II.

Title of Action: No. 31984. (5). George Arnold, et al., Respondents, vs. National Union Marine Cooks, etc., et al., Appellants.

Attorneys: Bassett, Geisness & Vance. Walthew, Oseran & Warner, John Caughlan, Siegfried Hesse.

Motion to Docket Appeal for Argument, Alternative Stay, Proposed Dismissal of Appeal. June 27, 1953. Denied, Grady, C. J.

No. 31984. (6). George Arnold, et al., Respondents, vs. National Union Marine Cooks, etc., et al., Appellants.

Bassett, Geisness & Vance. Walthew, Oseran & Warner, John Caughlan, Siegfried Hesse.

Motion to Dismiss. June 27, 1953. Granted, Grady, C. J.

Motion Docket Entries.

Motion Docket 10, pages 148 and 149.

Office of Clerk of Supreme Court.

[fol. 107] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

ORDER OF DISMISSAL—July 3, 1953

The above-entitled cause coming before the court on Friday, June 26, 1953, upon the motion of respondents for the entry of an order dismissing the appeal of appellants now pending here, and it appearing to the court that heretofore the appellant union was adjudged in contempt of the superior court, and this court in its opinion in Cause No. 32180 having informed it that its appeal in this cause would be dismissed unless within fifteen days of the date of the remittitur therein the appellant union purged itself of the order of contempt by complying with the Order of the Superior Court, and it further appearing to the court that the appellant union has not purged itself of such contempt by complying with such order within the time prescribed or at all,

It is therefore ordered that the appeal of National Union of Marine Cooks & Stewards Association be and the same is hereby dismissed because of its failure to purge itself of contempt of court.

Dated this 3d day of July, 1953.

By the Court: Thomas E. Grady, Chief Justice.

[File endorsement omitted.]

[fol. 108] IN THE SUPREME COURT OF THE STATE OF WASHINGTON

[Title omitted]

PETITION FOR REHEARING—Filed July 31, 1953

The above named appellant, National Union of Marine Cooks & Stewards Association, hereby respectfully petitions the above entitled court for a re-hearing of the order entered on July 3, 1953, dismissing its appeal for its failure to purge

itself of contempt of the Superior Court of King County. This petition is based upon the following legal grounds:

It Is a Denial of Due Process of Law Guaranteed by the Fourteenth Amendment of the Constitution of the United States to Deprive the Appellant of a Defensive Right by Striking Its Appeal from the Within Judgment.

The statutes of this state (RCW 4.88.010), and the rules of this court (Rules on Appeal, Rule 14, 34A Wash. (2d) 20), both grant the appellant the right of appeal from the within judgment.

The Supreme Court of the United States in *Hovey v. Elliott*, 167 US 407, held that to deprive a party litigant of its defensive rights was a denial of due process of law as guaranteed by the Fourteenth Amendment and, therefore, a sister state need not give any judgment, based upon such a denial, full faith and credit. The respondents herein have relied primarily upon the case of *Hammond Packing Co. v. Arkansas*, 212 US 322, in which the Supreme Court of the United States affirmed a judgment based upon a default, entered after a party litigant refused to give testimony and produce documents pursuant to a court order.

The distinction betwen the within case and the facts presented in the *Hammond* case, supra, is that the appellant herein has not been held in contempt for suppression of material evidence. This distinction is crucial, and has been [fol. 109] recognized repeatedly ever since the *Hovey* decision, supra. The Supreme Court of the United States, in fact, relied upon the decision of this court in *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, when it decided the *Hammond* case. The Circuit Court of Appeals for the District of Columbia in the recent case of *Duell v. Duell*, 178 F. (2d) 683, at 687, has expressly recognized this distinction:

> "The Hovey case holds it is a denial of due process to strip a defendant of his defenses as punishment for contempt. The Hammond opinion does not modify that rule; its holding is that, when a defendant has suppressed or failed to produce relevant evidence in his possession which he has been ordered to produce, a presumption arises as to the bad faith and untruth of his

> answer which justified striking it from the record and rendering judgment as though by default."

The court went on to point out that the defendant had not suppressed or failed to produce material evidence and, therefore, the *Hammond* rule was inapplicable and the *Hovey* rule applied. The annotation of the *Duell* case in 14 ALR (2d) 566 demonstrates beyond all doubt that the *Hovey* case still represents the law. It is, therefore, respectfully submitted that to deprive the within appellant of its defensive right of appeal when said right is granted by statute and court rule, clearly deprives the appellant of its property without due process of law.

The Statutory Method of Coercion and Punishment for Contempt is Exclusive

This court has long recognized that, while the legislature cannot deprive the courts of this state of their inherent powers of contempt, it can properly limit the manner and scope of the exercise of those powers: *In re Coulter*, 25 Wash. 526, 528-529:

> "While the power to punish for contempt is inherent in all courts . . . it is . . . in its nature, arbitrary, capable of abuse. . . . While the legislature may not lawfully take away this power altogether, it can, undoubtedly, to prevent its abuse, and to preserve the just rights of the individual, reasonably limit its exercise; that is to say, *it can* declare what acts or omissions shall constitute contempt, *define the character, and limit the amount of punishment that may be inflicted . . . the statute is imperative.*" (Emphasis supplied).

[fol. 110] The legislature has provided that, except as to contempts committed within the immediate view of the court, punishment for contempt must be pursuant to Title 7, Chapter 20, of the Revised Code of Washington: RCW 7.20.090. A careful examination of that chapter discloses no provision, under any circumstances, when this court may deprive a litigant of its right to appeal because of contempt of court.

Moreover, the specification of the grounds for dismissal of an appeal, set forth in Rule 51, Rules on Appeal, 34A, Wn. (2d) 50, does not include contempt of court. It seems adequately clear, therefore, that without such statutory authority the order dismissing the within appeal of appellant is improper and without authority.

For the above and foregoing reason it is hereby respectfully submitted that this court should grant the within petition for a re-hearing and set the argument on re-hearing *en banc*.

Respectfully submitted, Walthew, Oseran & Warner, Attorneys for Appellant, National Union Marine Cooks & Stewards Association.

[File endorsement omitted.]

[fol. 111] In the Supreme Court of the State of Washington

[Title omitted]

Order Denying Petition for Rehearing—Filed August 19, 1953

The court having considered the petition of the appellant National Union of Marine Cooks & Stewards Association for a rehearing herein,

It is ordered that the petition for a rehearing be and it is hereby denied.

Dated this 19 day of August, 1953.

Frank P. Weaver, Acting Chief Justice.

[File endorsement omitted.]

[fol. 112] In the Supreme Court of the State of Washington

George Arnold, Alvin Bailey, John O. Baine, B. F. Barsett, Dale A. Becks, Don Bickford, Charles Birdsall, Elmer J. Blanes, George C. Boettger, Herman Bolst, Gerald Bosley, Carol E. Campbell, A. W. Charlesworth, Burr D. Cline, Joseph Cline, Robert Cooney, J. R. Costello, Harold S. Darling, George Davey, Eugene A. Douglas, Dean H. Douglas, Howard Dow, Clarence J. Dyer, Dewey Erlsein, Francis Forde, William Francis, Robert C. Friend, Robert Galbraith, William C. Game, Joseph Green, George Heard, Ernest Henry, Wilbur Higginson, Herbert Hill, T. J. Howard, William Jenkins, Robert Jewell, Edsel Johns, Arnold W. Johnson, Charles L. Johnson, Frank Johnson, A. L. Jones, Art D. King, Harold Krause, Harley E. Krone, Frank Lachica, William Lande, Percy Landrigan, Marvin E. Lantz, Louis Larsen, Cliff Lattish, Jose Llorente, Cy Lord, Norman Maginn, A. L. Makenson, J. Ralph Mann, Tony Manzano, Tom McCaffery, Hugh McIntyre, Thomas C. McManus, William B. Miller, C. C. Moody, Charles Mosher, Al Mundt, George O'Leary, Harold Paige, Bernard M. Paluck, Jack Patterson, Frank C. Ponce, Clarence Reese, C. Responte, Virgil Rogers, Jack Roper, Dan Rotan, Don Rotan, Clarence Rothaus, Mathias Sabo, H. J. Schuchard, Frank Schulpeck, Ernest Shearer, John Siewick, Gus Sinclair, A. Sirriani, Leslie Smith, John Smocsyk, Fred Starks, Les Taft, Jack Taylor, James Triana, Don W. Tyler, Daniel Varady, Pedro Villabol, Hubert Whaley, Al Baide, John Boers, Max Schlossel and Carl W. Singer, Respondents,

vs.

National Union of Marine Cooks & Stewards Association, a voluntary association, and Joseph Harris, individually, and as Seattle Business Agent of said voluntary association, Appellants

Judgment—August 19, 1953

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the

Court having fully considered the same and being fully advised in the premises, it is now, on this 19th day of August, A. D. 1953, on motion of Bassett, Geisness & Vance, of counsel for respondents, considered, adjudged and decreed, that the appeal of the National Union of Marine Cooks & Stewards Association from the judgment of said Superior Court be, and the same is, hereby dismissed with [fols. 113-115] costs; and that the said respondents as named above have and recover of and from the said National Union of Marine Cooks & Stewards Association, and from American Bonding Company of Baltimore, surety to the extent of $200.00, the costs of this action taxed and allowed at Three hundred twenty-two and 50/100 ($322.50) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 116] Clerk's Certificate to foregoing transcript omitted in printing.

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[117] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

NATIONAL UNION OF MARINE COOKS & STEWARDS, Petitioner,

vs.

GEORGE ARNOLD, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

For the purpose of the petition for a writ of certiorari (and, in the event the petition be granted, for the purpose

of hearing and determining the case on the merits), the printed record shall consist of the following:

1. Judgment entered September 4, 1951 (Tr. 1-7).
2. Notice of Appeal to the Supreme Court (Tr. 8).
[fol. 118] 3. Adjudication of Contempt (Tr. 9-10).
4. Motion for dismissal of appeal, affidavit of John Geisness and Order of the Superior Court Appointing Receiver and Directing Transfer of Assets attached (Marked Exhibit A), (Tr. 11-17).
5. Answering Brief of Appellants Upon Motion for Dismissal of Appeal (Tr. 28-36).
6. Order dated May 17, 1952, and filed May 19, 1952 (Tr. 38-39).
7. Supplemental Motion for Dismissal of Appeal (Tr. 40-41).
8. Appellants' Brief in Opposition to Supplemental Moton for Dismissal of Appeal (Tr. 48-56).
9. Motion Docket Entry "Motion and Supplemental Motion for Dismissal of Appeal Held in Abeyance"—Motion Docket 10, page 91—6/13/52 Records Clerk of the Supreme Court (Tr. 57).
10. Motion for Leave to File Affidavit in Support of Motion to Dismiss Appeal (Copy of Affidavit attacied and made part of motion) (Tr. 61-63).
11. Affidavit of H. J. Schuchard in Support of Motion to Dismiss Appeal (Tr. 65-66).
12. Affidavit of Robert Ward in Opposition to Respondents' Motion for Leave to File Additional Affidavit (Tr. 72-74).
13. Motion to docket the Appeal of Joseph Harris for Hearing and affidavit of Joseph Harris. (Tr. 79-82).
14. Motion to Docket Appeal for Argument, or in the Alternative to Stay Proposed Dismissal of Appeal (Tr. 86).
15. Brief in Support of Motion to Docket Appeal for Argument, or in the Alternative, to Stay Proposed Dismissal of Appeal (Tr. 88-90).
16. Motion to Dismiss (Tr. 91).
17. Affidavit for Dismissal (Samuel B. Bassett) (Tr. 92-93).
[fol. 119] 18. Brief of Respondents Upon Pending Motions (Tr. 97-103).

19. Motion Docket Entries (Tr. 106).

20. Order of the Supreme Court dismissing the appeal of the National Union of Marine Cooks & Stewards Association (because of its failure to purge itself of contempt of court). (Tr. 107).

21. Petition for Rehearing (Tr. 108-110).

22. Order Denying Petition for Rehearing (Tr. 111).

23. Judgment of the Supreme Court entered Wednesday, August 19, 1953, (dismissing appeal of National Union of Marine Cooks & Stewards Association) (Tr. 112-113).

It is further stipulated and agreed that any of the parties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed.

(S.) Norman Leonard, Counsel for Petitioner; Samuel B. Bassett, Counsel for Respondents.

Dated this 27 day of November, 1953.

[fol. 120] Supreme Court of the United States, October Term, 1953

No. —

National Union of Marine Cooks and Stewards, a voluntary association, Petitioner,

vs.

George Arnold, et al.

Order Extending Time to File Petition for Writ of Certiorari

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Jan. 16, 1954.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 6th day of November, 1953.

[fol. 121] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 529

NATIONAL UNION OF MARINE COOKS AND STEWARDS, a Voluntary Association, Petitioner,

vs.

GEORGE ARNOLD, et al.

ORDER ALLOWING CERTIORARI—Filed March 8, 1954

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. [redacted] 19

NATIONAL UNION OF MARINE COOKS & STEWARDS, a voluntary association,
Petitioner,

vs.

GEORGE ARNOLD, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of Washington.

NORMAN LEONARD,
240 Montgomery Street, San Francisco 4, California,
Counsel for Petitioner.

Subject Index

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No.

NATIONAL UNION OF MARINE COOKS & STEWARDS, a voluntary association,
Petitioner,

vs.

GEORGE ARNOLD, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of Washington.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of the State of Washington, entered on July 3, 1953, dismissing the appeal of petitioner from a money judgment in the sum of $475,000.

OPINION BELOW.

The order of the Supreme Court of the State of Washington dismissing petitioner's appeal (R. 53) is unreported.

JURISDICTION.

The judgment of the Supreme Court of the State of Washington was entered on July 3, 1953. The order denying petitioner's timely petition for rehearing was entered on August 19, 1953. (R. 56.) On November 6, 1953, Mr. Justice Douglas entered an order extending the time for filing the within petition for certiorari to January 16, 1953. (R. 60.) The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

The federal questions presented herein were precipitated by respondents' original motion before the Court below (i.e., the Supreme Court of Washington, not the trial Court) to dismiss petitioner's appeal. (R. 11-14.) Petitioner interposed its claim for federal constitutional protection in the very first document it filed thereafter, its "Answering Brief of Appellants Upon Motion for Dismissal of Appeal." (R. 17, 22.)[1] The Court below failed to pass upon federal issues raised at any stage of the proceeding.

Since the basis for the motion to dismiss the appeal was an adjudication of contempt before the trial Court

[1]This claim was consistently thereafter raised: Appellants' Brief in Opposition to Supplemental Motion for Dismissal of Appeal (R. 26, 28); Brief in Support of Motion to Docket Appeal for Argument, Or In the Alternative, to Stay Proposed Dismissal of Appeal (R. 42, 43); Petition for Rehearing (R. 53, 54).

in *supplemental* proceedings (R. 9, 10), and the motions to dismiss were made for the first time before the Court below, *subsequent to the perfection of the appeal* (R. 12), the federal issues were presented at the earliest possible time. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673; *Great Northern Ry. Co. v. Sunburst Oil and Refining Co.*, 287 U.S. 358.

QUESTIONS PRESENTED.

Whether it was either a deprivation of property without due process of law or a denial of the equal protection of the laws, each guaranteed by the Fourteenth Amendment to the Constitution of the United States, for the Court below to dismiss petitioner's appeal on the merits solely because petitioner had been found in contempt of the trial Court in supplemental proceedings.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourteenth Amendment to the Constitution of the United States provides, as pertinent:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

On September 4, 1951, respondents (ninety-five in number) each recovered a judgment against petitioner and its agent, Joseph Harris, for $5,000, or a total judgment of $475,000.00. (R. 1-8.) Appeals by both petitioner and Harris were duly perfected. (R. 9.)

Thereafter in supplemental proceedings, respondents obtained orders from the trial Court adjudging petitioner in contempt for failure to deposit over a quarter of a million dollars in bonds with a Court appointed receiver. (R. 9, 14.) On the basis of this adjudication, respondents immediately moved to dismiss the appeals of both petitioner and its agent Harris. (R. 11.) On May 17, 1952, the Court below ordered both appeals stricken from the calendar pending its determination of petitioner's appeal from the contempt adjudication. (R. 23-24.)[2]

After over a year's submission, the contempt adjudication was ultimately affirmed. *Arnold v. National Union of Marine Cooks, etc.*, 42 Wn. (2d) ____; 142 Wash. Dec. 590. At the conclusion of the contempt opinion, the Court below ordered petitioner to purge itself of the contempt by "delivery of the bonds to the receiver" on pain of dismissal of its appeal in the within case.[3]

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[2]On May 29, 1952, respondents filed a supplemental motion to dismiss the appeals on the ground that petitioner's appeal from the contempt adjudication should be likewise dismissed. (R. 24-25.) This latter motion was denied. *Arnold v. National Union of Marine Cooks, etc.*, 41 Wn. (2d) 22.

[3]The pertinent language appears in *Arnold v. National Union of Marine Cooks, etc.*, 42 Wn. (2d) ____; 142 Wash. Dec. 590, at

Thereafter, both petitioner and Harris filed separate motions to docket their pending appeals for argument (R. 39, 41); and respondents renewed their motion to dismiss both appeals. (R. 44.) After argument on the various pending motions, the Court below granted Harris' motion to docket his appeal,* denied petitioner's motion to docket its appeal, and granted respondents' motion to dismiss petitioner's appeal. (R. 52.)

Accordingly, the Court below entered its order dismissing petitioner's appeal. (R. 53.) A petition for rehearing was duly filed (R. 53-56), and was denied on August 19, 1953 (R. 56), and a formal judgment and remittitur was entered. (R. 57-58.)

596, as follows: "The adjudication of contempt is affirmed, and the appeal presently pending in the main action shall be dismissed unless, within fifteen days from the date of the remittitur herein, the appellant union purges itself of the order of contempt, by complying with the trial court's order requiring delivery of the bonds to the receiver."

*The appeal of Harris was argued and submitted on October 8, 1953. No opinion has yet been filed. Since petitioners' liability is based exclusively on the theory of *respondeat superior*, the judgment against it cannot stand, if the judgment against its agent Harris is reversed. The court below has repeatedly so held. *Dorenus v. Root*, 23 Wash. 710; *Ogilvie v. Hong*, 175 Wash. 209; *Gerritsen v. Seattle*, 164 Wash. 459; *Duvall v. Pioneer Sand & Gravel Co.*, 191 Wash. 417; *Forquer v. Hidden*, 191 Wash. 638; *Johns v. Hake*, 15 Wn. (2d) 651; *Marshall v. Chapman's Estate*, 31 Wn. (2d) 137. This results even if a final judgment has been obtained. *See In re LeFevre*, 9 Wn. (2d) 145, where a nonappealing guardian was held entitled to the benefits of the appeal of the surety.

SPECIFICATIONS OF ERROR TO BE URGED.

The Supreme Court of the State of Washington erred:

1. In denying petitioner's motion to docket its appeal for hearing;

2. In granting respondents' motion to dismiss petitioner's appeal;

3. In denying petitioner's petition for rehearing.

REASONS FOR GRANTING THE WRIT.

THE ORDER DISMISSING PETITIONER'S APPEAL IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF THE CIRCUIT COURTS OF APPEALS, AND DEPRIVES PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW AND DENIES TO PETITIONER THE EQUAL PROTECTION OF THE LAWS.

This petition presents some of the issues left untouched by this Court in *Hovey v. Elliott*, 167 U.S. 409. In that case the Supreme Court of the District of Columbia had ordered the defendants' answer stricken for failure to comply with an order to transfer funds totaling $49,297.50 (the subject matter of the action) to a court-appointed receiver. Thereupon a default judgment was entered. Thereafter, however, the Court of Appeals for New York refused to give the default judgment full faith and credit. This Court, after an exhaustive examination of the pertinent cases, affirmed the decision of the New York Court.

The precise issue before the Court was:

". . . whether a court possessing plenary power to punish for contempt, unlimited by statute,[5] has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court." (167 U.S. at 413.)

This Court concluded:

". . . analysis . . . conclusively establish[es] that there is no basis for the assertion that the courts of chancery in England claimed or exercised the power, after answer filed, to decree *pro confesso* on the merits against a defendant, merely because he persisted in disobedience to an order of the court, though the cases do show that the chancery courts commonly refused to hear a defendant in contempt when asking at their hands a favor. The difference between the want of power, on the one hand, to refuse to one in contempt the right to defend in the principal case on the merits, and the existence of the authority, on the other, to refuse to accord a favor to one in contempt, is clearly illustrated by the whole line of adjudicated cases." (167 U.S. at 423-4.)

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[5]See footnote 12, *infra*, where it is pointed out that the manner of exercise of the contempt power is proscribed by statute in the State of Washington.

Adverting to the problem specifically raised herein, this Court noted, quoting from *McKane v. Durston*, 153 U.S. 687, that:

> "An appeal from a judgment of conviction is not a matter of absolute right, independent of constitutional or statutory provisiors[6] allowing such appeal." (167 U.S. at 443-4.)

And, immediately thereafter, this Court reserved opinion on the merits of the instant situation:

> "Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by the statute, is a question not involved in this suit." (167 U.S. at 444.)

The Court below, in the instant case, dismissed petitioner's appeal solely because of a failure to comply with an order to satisfy a substantial portion of the judgment appealed from by posting bonds with a Court appointed receiver. That dismissal is at odds with the rationale of *Hovey v. Elliott*, deprives petitioner of its property without due process of law, and denies to petitioner the equal protection of the laws as guaran-

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[6]See footnotes 7 and 8, *infra*, where the statutory (and court rule) provisions respecting the right of appeal, relevant to the instant case, are quoted.

teed by the Fourteenth Amendment to the Constitution of the United States.

While it would not be a deprivation of due process to abolish the right to appeal altogether or in certain cases (*District of Columbia v. Clawans*, 300 U.S. 617) or a denial of equal protection to provide different appellate procedures (*Ohio ex rel. Bryant v. Akron Metropolitan Park District*, 281 U.S. 74) or different appellate remedies to different classes of litigants (*Pittsburgh, etc., Ry. Co. v. Backus*, 154 U.S. 421), it is quite different to deprive one specific litigant of the right to defend against a judgment by way of an appeal, when such right of appeal is granted by statute to all litigants.

The State of Washington by statute[7] and Court rule[8] grants to all litigants the right to appeal from money judgments. And the State Supreme Court is required to hear all such appeals on the merits.[9] Contempt is

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[7]Revised Code of Washington (hereinafter cited RCW) 4.88.010, provides as relevant: "Any party aggrieved may appeal to the supreme court in the mode prescribed in this chapter from any and every of the following determinations, and no others, made by the superior court, or the judge thereof, in any action or proceeding: (1) From the final judgment entered in any action or proceeding . . ."

[8]Rules on Appeal 14, 34A Wn. (2d) 20, provides as relevant: "Any party aggrieved may appeal to the supreme court in the mode prescribed in these rules from any and every of the following determinations, and no others, made by the superior court, or the judge thereof, in any action or proceeding: (1) From the final judgment entered in any action or proceeding . . ."

[9]RCW 4.88.280 provides: "The supreme court shall hear and determine all causes removed thereto in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities, and shall upon the hearing consider all amendments which could have been made as made."

not one of the grounds specified in either the statute[10] or the Court rule,[11] for the dismissal of such, or any, appeals, nor is the dismissal of such an appeal specified as a ground for the punishment of a contempt.[12]

Thus the statutory structure, the Court rules, and the decisional law of the State of Washington grant

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[10]RCW 4.88.150 as relevant provides: "Any respondent may move the supreme court, at such time and in such manner as the court by its rules prescribes, to dismiss an appeal either on the ground that the court has no jurisdiction of an appeal from the judgment or order from which the appeal was taken, or that the notice of appeal was not served or filed within the time limited by law, or is insufficient, or that the appeal bond was not filed within the time limited by law, or is not in form or substance such as to render the appeal effectual, or that the appellant's brief has not been served or filed, or that the record on appeal has not been sent up, or that the appeal has not been diligently prosecuted or on any ground going to the merits of the further prosecution of the appeal, or on any two or more of the grounds herein mentioned . . ."

[11]Rules on Appeal 51, 34A Wn. (2d) 55, likewise provides as relevant: "Any respondent may move the supreme court to dismiss an appeal either on the ground that the court has no jurisdiction of an appeal from the judgment or order from which the appeal was taken, or that the notice of appeal was not served or filed within the time limited by rule, or is insufficient, or that the appeal bond was not filed within the time limited by rule, or is not in form or substance such as to render the appeal effectual, or that the appellant's brief has not been served or filed, or that the record has not been sent up, or that the appeal has not been diligently prosecuted, or on any ground going to the merits of the further prosecution of the appeal, or on any two or more of the grounds hereinabove mentioned . . ."

[12]RCW 7.20.090 provides: "Upon the evidence so taken, the court or judicial officer shall determine whether or not the defendant is guilty of the contempt charged; and if it is determined that he is guilty, shall sentence him to be punished as provided in this chapter." The chapter (Chapter 20 of Title 7 of the Revised Code of Washington) makes no provision for the dismissal of an appeal as punishment for contempt. The court below, from an early date has held that the courts are limited in the exercise of contempt powers to the statutorily prescribed manner. *In re Coulter*, 24 Wash. 526.

an appeal on the merits without regard to the "contempt status" of the appellant.

While in its narrow holding *Hovey v. Elliott* was limited to the right to defend at the initial hearing, the rationale of the decision applies with equal force to the instant case, where there has been a denial of the statutory right to an appeal from a judgment. The judgment may be equally invalid whether granted by default or affirmed by default. The litigant is deprived of his property without due process of law in either case. In both cases an asserted *defensive* right is destroyed.

The case at bar is unlike *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, which affirmed a state court default judgment entered after the defendant had refused to testify or to produce material evidence. In the *Hammond* case this Court recognized the fundamental validity of *Hovey v. Elliott* and emphasized the difference in the two cases.

> "Hovey v. Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. . . . The difference between mere punishment, as illus-

> trated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." (212 U.S. at 350-351.)

The *Hovey* doctrine has recently been followed (*Duell v. Duell*, 178 F. (2d) 683 [CA DC, 1949]),[13] and even extended to protect the right of intervention (*Deauville Associates v. Eristavi-Tchitcherine*, 173 F. (2d) 745 [CA 5, 1949]). In the last cited case, the Court of Appeals said, *supra*, at page 746:

> "A litigant may be punished for contempt by fine or imprisonment, or both. . . . but the Court should not prescribe, as a means by which he should purge himself of such contempt, that its doors be closed for him in defense of either his liberty or his property."

An examination of the realities of the instant case, moreover, clearly demonstrates that the contempt adjudication is merely the facade for an attempt to deny to petitioner the equal protection of the laws. The trial

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[13]The Court of Appeals recognized the basic difference between the *Hovey* and the *Hammond* cases: "The Hovey case holds it is a denial of due process to strip a defendant of his defenses as punishment for contempt. The Hammond opinion does not modify that rule; its holding is that, when a defendant has suppressed or failed to produce relevant evidence in his possession which he has been ordered to produce, a presumption arises as to the bad faith and untruth of his answer which justifies striking it from the record and rendering judgment as though by default." (178 F. (2d) at 687.)

Court's order (in the supplemental proceedings) was in aid of execution on the judgment. Respondents were seeking *satisfaction* of the judgment, since it had not been superseded.

The right to appeal in the State of Washington is, however, not conditioned upon the satisfaction of the judgment appealed from.[14] When petitioner pointed out that the motion to dismiss ultimately rested on the converse of this rule (R. 17, 18, 23), respondents in their Supplemental Motion for Dismissal of Appeal asked the Court below to direct ". . . the said Superior Court not to authorize any payment or distribution to creditors by said receiver until further order of this Court" (R. 24-25), thus converting their demand that petitioner *satisfy* the judgment to a demand that petitioner *supersede* the judgment *pro tanto* as a condition to its appeal.

This amended demand, however, was equally at odds with petitioner's statutory rights, since a supersedeas bond is likewise not a precondition to an appeal in the State of Washington.[15] In any event, the Court below did not adopt the suggested change; it ordered peti-

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[14]The relevant portion of RCW 4.88.060 provides. "The appeal bond must be executed in behalf of the appellant by one or more sufficient sureties, and shall be in a penalty of not less than two hundred dollars in any case; *and in order to effect a stay of proceedings* as in this section provided, the bond, where the appeal is from a final judgment for the recovery of money shall be in a penalty double the amount of the damages and costs recovered in such judgment and in other cases shall be in such penalty, not less than two hundred dollars, and sufficient to save the respondent harmless from damages by reason of the appeal, as a judge of the superior court shall proscribe . . ."

[15]See provisions of RCW 4.88.060 quoted in footnote 14, *supra*.

tioner to comply with the order to deliver the bonds to the receiver without any limitations, qualifications, or conditions.[16] Upon the failure of petitioner so to satisfy the judgment to the extent of $290,000, and for that reason only, petitioner's appeal was dismissed. (R. 53.)

We are thus presented with the situation where petitioner, unlike all other litigants in the State of Washington, is denied its appeal from an unsatisfied money judgment totaling almost a half a million dollars merely because it has failed to satisfy or supersede said judgment. It is respectfully submitted that such a case clearly deprives petitioner of the equal protection of laws. *Yick Wo v. Hopkins,* 118 U.S. 356; *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673; *Powell v. Alabama,* 287 U.S. 45; *Patterson v. Alabama,* 294 U.S. 600; *Missouri ex rel. Gaines v. Canada,* 305 U.S. 337; *Cochran v. Kansas,* 316 U.S. 255; *Shelly v. Kraemer,* 334 U.S. 1.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

January, 1954.

Respectfully submitted,

NORMAN LEONARD,
240 Montgomery Street, San Francisco 4, California,
Counsel for Petitioner.

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[16]See footnote 3, *supra.*

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1953

No. [redacted] 19

NATIONAL UNION OF MARINE COOKS & STEWARDS, a voluntary association,
Petitioner,

vs.

GEORGE ARNOLD, et al.,
Respondents.

REPLY MEMORANDUM FOR PETITIONER.

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PERNAU WALSH PRINTING CO., SAN FRANCISCO

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No. 529

NATIONAL UNION OF MARINE COOKS & STEWARDS, a voluntary association,
Petitioner,

vs.

GEORGE ARNOLD, et al.,
Respondents.

REPLY MEMORANDUM FOR PETITIONER.

1. The federal questions were properly raised. Respondents' Brief substantially concedes (pp. 2-3) that petitioner clearly invoked the protection of the due process clause of the Fourteenth Amendment before the Court below, but argues that the equal protection clause was not properly relied upon. However, the very language of petitioner's claim quoted in respondents' Brief (p. 4) specifically refers to both

of these clauses of the Fourteenth Amendment.[1] Since concededly the due process point was properly raised, and since the equal protection point is so closely related to it, no good purpose will be served by limiting the scope of review as suggested by respondents. Nor should the Court do so, for

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is regarded as having been adequately presented." (*New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67.)

2. The assertion in respondents' Brief (p. 7) that "due process does not comprehend the right of appeal" is no answer to the question expressly left open by this Court in *Hovey v. Elliott*, 167 U.S. 409, 444:

> "Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself *of a right granted by statute*, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense, and where the one in contempt was an

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[1] "Such action, if pursued by this Court, would deprive appellants (petitioner) of property without due process of law, *and deny to them equal protection of the law: Hovey v. Elliott*, (1896), 167 U.S. 407 * * *" (R. 28.) (Italics supplied.)

actor invoking *the right allowed by statute,*[2] is a question not involved in this suit."

That specific question is involved in the suit at bar, and to answer it now the writ should be granted.

3. The differences (noted in the Petition, pp. 11-12) which both this Court and the Courts of Appeals have pointed out between the *Hovey* case and *Hammond Packing Co. v. Arkansas,* 212 U.S. 332, are ignored in respondents' Brief (pp. 8-9), which confuses punishment for contempt with the utilization of a presumption arising from the refusal to produce evidence.[3]

4. The discriminatory treatment accorded to petitioner is not denied, and the authorities cited in the Petition (p. 14) demonstrate that such treatment cannot withstand the test of the equal protection clause of the Fourteenth Amendment. That classifications in inheritance tax statutes based upon familial relationships (*Magoun v. Illinois Trust etc. Bank,* 170 U.S. 283) or in anti-trust acts in favor of agriculture or livestock in the hands of producers

[2]Italics supplied. Petitioner's contention that its right to an appeal is "granted" or "allowed" by statute in Washington (Petition, pp. 9-10) is nowhere challenged in respondents' Brief.

[3]This Court in the *Hammond* case emphasized that its decision there was not inconsistent with its holding in *Hovey:*

"Hovey v. Elliott involved a denial of all right to defend as mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession * * * The difference between mere punishment, as illustrated in Hovey v. Elliot, and the power exercised in this, is as follows * * *" (212 U.S. 350-351.)

(*Tigner v. Texas*, 310 U.S. 141), have been held, as respondents point out (p. 9), not to violate the equal protection clause hardly seems relevant here.[4]

To resolve the conflicts created between the decision below and the decision of this Court in *Hovey v. Elliott*,[5] and to assure petitioner its day in Court before a judgment of great magnitude is made final against it,[6] the writ should be granted.

Dated, San Francisco, California,
February 19, 1954.

Respectfully submitted,
NORMAN LEONARD,
Counsel for Petitioner.

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[4]Another case cited by respondents (p. 10) is clearly beside the point, holding as it did that a statute permitting mutual insurance companies to do business through salaried employees while denying that privilege to stock companies, created an arbitrary and unconstitutional classification. (*Hartford Steam Boiler Inspection & Insurance Co. v. Harrison*, 301 U.S. 459.)

[5]Respondents do not even mention the Courts of Appeals cases noted in the Petition (p. 12) which follow the *Hovey* case: *Duell v. Duell*, 178 F. 2d 683 (CA DC, 1949) and *Deauville Associates v. Eristavi-Tchitcherine*, 173 F. 2d 745 (CA 5, 1949).

[6]Respondents' Brief impliedly recognizes that the charge that petitioner is "dissipating" its assets is not relevant to the question before the Court. (p. 6.) But since the argument is made with some vehemence (p. 11), it may not be amiss to point out that the charge is not undenied. (R. 37-38.)

In the Supreme Court
OF THE
United States

OCTOBER, 1954

No. 19

NATIONAL UNION OF MARINE COOKS & STEWARDS, a voluntary association,
Petitioner,

vs.

GEORGE ARNOLD, et al.,
Respondents.

BRIEF FOR PETITIONER.

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Of Counsel.

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NATIONAL UNION OF MARINE COOKS & STEWARDS, a voluntary association,
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BRIEF FOR PETITIONER.

OPINION BELOW.

The order of the Supreme Court of the State of Washington dismissing petitioner's appeal (R 53) is unreported.

JURISDICTION.

The judgment of the Supreme Court of the State of Washington was entered on July 3, 1953 (R 53).

The order denying petitioner's timely petition for rehearing was entered on August 19, 1953 (R 56). On November 6, 1953, Mr. Justice Douglas entered an order extending the time for filing a petition for a writ of certiorari to January 16, 1954 (R 60). The petition was filed on January 11, 1954, and was granted on March 8, 1954 (347 U.S. 916), at which time the case was transferred to the summary docket (R 61). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).[1]

CONSTITUTIONAL PROVISIONS INVOLVED.[2]

This case involves the Fourteenth Amendment to the Constitution of the United States which provides, as pertinent here:

> ". . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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[1]The federal questions presented here were raised by respondents' original motion before the Supreme Court of the State of Washington to dismiss petitioner's appeal from a money judgment. Petitioner interposed its claim for federal constitutional protection in the very first document filed thereafter (Petition, 2-3). Under the circumstances, the claim was timely (*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673; *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358).

[2]We reverse the hitherto usual order of this and the following heading because that appears to be required by Rule 40 of the Revised Rules of this Court, effective July 1, 1954.

QUESTION PRESENTED.

The Court below dismissed, without a hearing on the merits, petitioner's appeal from a judgment rendered against it in the sum of $475,000. This dismissal was ordered solely because of petitioner's failure to deliver to a receiver almost $300,000 worth of bonds and thereby to "purge" itself of a contempt order.

The question presented is whether it was either a deprivation of petitioner's property without due process of law or a denial to it of the equal protection of the laws, each guaranteed to it by the Fourteenth Amendment to the Constitution of the United States, for the Court below to dismiss the appeal solely because petitioner had not purged itself of contempt in the manner indicated.

STATEMENT.

On September 4, 1951, respondents (95 in number) each recovered a judgment against petitioner—a trade union—and its local agent for $5,000, a total judgment of $475,000 (R 1-8). The action a libel suit, arose out of the alleged "blacklisting", by petitioner's agent, Joseph Harris, of respondents following their "desertion" from the union and their attempts to form a rival union.[3] Appeals from this judgment were duly perfected (R 9).

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[3]The National Labor Relations Board found the blacklist to have been a violation of Section 8(b)(1)(A) of the Labor Management Relations Act of 1947 (29 U.S.C.A. 158) and ordered reinstatement and back pay (*Pacific American Shipowners Association, et al.*, 98 NLRB 582).

Thereafter, in supplemental proceedings, respondents obtained orders from the trial Court adjudging petitioner in contempt for failure to deposit over a quarter of a million dollars in bonds with a Court-appointed receiver (R 9, 14).[4] On the basis of this adjudication respondents immediately moved to dismiss the appeals in the principal case (R 11). The Court below ordered these appeals stricken from its calendar pending a determination of petitioner's appeal from the contempt adjudication (R 23-24).

In its opinion affirming the contempt adjudication (*Arnold v. National Union of Marine Cooks, etc.*, 42 Wn. 2d 648), the Court below ordered petitioner to purge itself of the contempt upon pain of the dismissal of its appeal in the instant case.

> "The adjudication of contempt is affirmed, and the appeal presently pending in the main action shall be dismissed unless, within fifteen days from the date of the remittitur herein, the appellant union purges itself of the order of contempt, by complying with the trial court's order requiring the delivery of the bonds to the receiver." (42 Wn. 2d at 654.)

Thereafter, without delivering the bonds to the receiver, petitioner filed a motion to docket the appeal pending in the main action (R 41), and at the same time respondents renewed their motion to dismiss it

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[4]The contempt adjudication was ultimately affirmed on appeal (*Arnold v. National Union of Marine Cooks, etc.*, 42 Wn. 2d 648), and this Court dismissed a subsequent appeal for want of a substantial federal question (*National Union of Marine Cooks, etc., v. Arnold*, 346 U.S. 881).

(R 44). After argument the Court below denied petitioner's motion to docket the appeal and granted respondents' motion to dismiss (R 52) and entered an order of dismissal "because of its [petitioner's] failure to purge itself of contempt of Court" (R 53). A petition for rehearing was duly filed (R 53-56) and was denied (R 56), and a formal judgment and remittitur was entered (R 57-58).

SUMMARY OF ARGUMENT.

Petitioner was deprived of its property without due process of law by the dismissal of its appeal from a $475,000 judgment solely because of its failure to satisfy or supersede the judgment. Contrary to the applicable statutes and to its own rules and decisions, the Court below dismissed petitioner's appeal without a hearing on the merits because of a contempt grounded upon a refusal to satisfy or supersede the judgment.

Such action is contrary to the rationale of the decisions of this Court and of the Courts of Appeal. *Hovey v. Elliott*, 167 U.S. 409; *Deauville Associates v. Eristavi-Tchitcherine*, 173 F. 2d 745; *Duell v. Duell*, 178 F. 2d 683. Nor can it be supported on the basis of such cases as *Hammond Packing Co. v. Arkansas*, 212 U.S. 332, wherein a default was taken for failure to testify and produce evidence.

Since the failure to deposit the funds afforded no rational basis for drawing an inference of lack of

merit in the appeal, it would be a deprivation of property without due process of law to permit such a presumption to operate here. *Manning, v. Mutual Life Insurance Co.*, 100 U.S. 693; *Maggio v. Zeitz*, 333 U.S. 56.

Furthermore, by singling out petitioner for special treatment, the judgment below denies to it the equal protection of the laws. *Yick Wo v. Hopkins*, 118 U. S. 356; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673; *Cochran v. Kansas*, 316 U.S. 255.

ARGUMENT.

THE ORDER DISMISSING ITS APPEAL DEPRIVED PETITIONER OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIED TO IT THE EQUAL PROTECTION OF THE LAWS, CONTRARY TO THE PROVISIONS OF THE FOURTEENTH AMENDMENT.

I.

THE APPEAL WAS DISMISSED SOLELY TO PUNISH PETITIONER FOR FAILURE TO SATISFY OR SUPERSEDE THE JUDGMENT.

There can be no argument but that the appeal to the Supreme Court of the State of Washington was dismissed and the judgment for $475,000 against petitioner was affirmed without any consideration of the merits because, and only because, petitioner did not purge itself of contempt of the trial court. Nor can there be any argument but that the only contempt involved was the failure to deliver up the bonds to a receiver (R. 9-10, 13, 14-15). Petitioner was thus *pun-*

ished for its failure to deliver up the bonds. No other conclusion is possible.

The order of dismissal recited:

> ". . . it appearing to the court that heretofore the appellant union [petitioner] was adjudged in contempt of the Superior Court, and this court . . . having informed it that its appeal in this cause would be dismissed unless within fifteen days . . . the appellant union purged itself of the order of contempt by complying with the order of the Superior Court, and it further appearing to the court that the appellant union has not purged itself of such contempt by complying with such order within the time prescribed or at all,
>
> It is therefore ordered that the appeal . . . be and the same is hereby dismissed because of its failure to purge itself of contempt of court." (R 53).

The language used by the Court below in its opinion issued preceding the actual dismissal specified that the only way in which petitioner could "purge" itself was by "the delivery of the bonds to the receiver" (*supra,* p. 4).

This unequivocal language leaves no room for doubt that the dismissal of the appeal was intended to punish petitioner for its failure to deliver the bonds. Indeed, the insertion of this specific language into the "contempt" opinion issued preceding the dismissal can only be regarded as an effort to use the coercive power of the Court to compel the delivery of the bonds upon pain of dismissal of the appeal.

And the subsequent dismissal itself reflects the punishment actually imposed for the failure to comply with the order.

II.

SUCH A PUNISHMENT IS CONTRARY TO THE LOCAL STATUTES AND RULES.

The State of Washington has by statute granted to all litigants the right to appeal from money judgments.

> "Any party aggrieved may appeal to the supreme court in the mode prescribed in this chapter from any and every of the following determinations, and no others, made by the supreior court, or the judge thereof, in any action or proceeding: (1) From the final judgment entered in any action or proceeding . . ." (Revised Code of Washington [hereinafter cited RCW] 4.88.010.)[5]

The State of Washington requires its Supreme Court to hear all such appeals on the merits.

> "The supreme court shall hear and determine all causes removed thereto in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities, and shall upon the hearing consider all amendments which could have been made as made." (RCW 4.88.280.)

The State of Washington has enumerated, as it constitutionally might (cf. *McKane v. Durston*, 153

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[5]The rules of the Supreme Court of the State of Washington are to the same effect (Rules on Appeal 14, 34A Wn. 2d 20).

U.S. 684; *Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S. 74), the grounds upon which an appeal may be dismissed, but significantly it has not specified a contempt of Court as one of them.

> "Any respondent may move . . . to dismiss an appeal either on the ground that the court has no jurisdiction of an appeal . . . or that the notice of appeal was not served or filed within the time limited by law, or is insufficient, or that the appeal bond was not filed within the time limited by law, or is not in form or substance such as to render the appeal effectual, or that the appellant's record on appeal has not been sent up, or that the appeal has not been diligently prosecuted or on any ground going to the merits of the further prosecution of the appeal, or on any two or more of the grounds herein mentioned . . ." (RCW 4.88.150.)[6]

On the contrary, the legislature of the state has carefully specified the punishments which may be imposed for contempt and has not included the dismissal of an appeal as one of them.

> "Upon the evidence so taken, the court or judicial officer shall determine whether or not the defendant is guilty of the contempt charged; and if it is determined that he is guilty, shall sentence him to be punished *as provided in this chapter.*" (RCW 7.20.090.)

The chapter referred to (Chapter 20 of Title 7 of the Revised Code of Washington) makes no provision

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[6]The rules of the Supreme Court of the State of Washington are to the same effect (Rules on Appeal 51, 34A Wn. 2d 55).

for the dismissal of an appeal as punishment for contempt.

The Court below, from an early date has held that the Courts of the state are limited by this statute with respect to the "amount" and "character" of the punishment which may be inflicted for contempt. (*In re Coulter,* 25 Wash. 526, 529.)

III.

THE DISMISSAL OF THE APPEAL IN THIS CASE RAISES A FEDERAL CONSTITUTIONAL QUESTION.

Although the interpretation of its statutes and rules is a matter usually reserved to the judgment of a state Court, a federal question is raised if such an interpretation deprives a person of property without due process of law. In such a case a question for this Court's consideration is properly presented.

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court. . . . But, while it is for the state courts to determine the adjective as well as the substantive law of the state,

> they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."
>
> *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, at 680-82.[7]

So, here, the judgment below cannot be insulated from this Court's scrutiny on the theory that it involves simply a matter of state appeliate procedure. The denial of the right to be heard on appeal, otherwise universally granted in Washington, raises a federal question of the highest significance. This is particularly so where as here, the denial was based upon petitioner's failure to purge itself of a contempt not related in any manner to the merits of the cause.

IV.

THE DISMISSAL OF ITS APPEAL DEPRIVED PETITIONER OF A RIGHT TO DEFEND ITS PROPERTY IN THE STATE COURTS.

This case presents an issue left open in *Hovey v. Elliott*, 167 U.S. 409, in which the Supreme Court of

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[7]Cf. *Cochran v. Kansas*, 316 U.S. 255, 258, where the case was remanded to the State Court for further proceedings because of an undenied claim that "Kansas refused him privileges of appeal which it afforded to others", and *Galloway v. Dowd*, 347 U.S. 1017, where, although the petition for certiorari was denied, the ruling was made expressly "without prejudice to petitioner to initiate a new proceeding alleging refusal [of the state court] to allow an appeal."

the District of Columbia had ordered an answer stricken and judgment by default entered against a defendant for his failure to comply with an order to transfer funds to a receiver. This Court, after an exhaustive examination of the pertinent authorities, affirmed the decision of the New York Court of Appeals which had refused to give full faith and credit to the default judgment.

The precise issue before the Court was:

> ". . . whether a court possessing plenary power to punish for contempt, unlimited by statute,[8] has the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court." (167 U.S. at 413.)

This Court concluded that

> ". . . analysis . . . conclusively establish[es] that there is no basis for the assertion that the Courts of Chancery in England claimed or exercised the power, after answer filed, to decree *pro confesso* on the merits against a defendant, merely because he persisted in disobedience to an order of the court, though the cases do show that the Chancery Courts commonly refused to hear a defendant in contempt when asking at their hands a favor. The difference between the want

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[8]See *supra*, pp. 9-10, where are set forth the statutes, rules and decisions limiting the punishments which may be imposed for contempt in the State of Washington.

> of power, on the one hand, to refuse to one in contempt the right to defend in the principal case on the merits, and the existence of the authority, on the other, to refuse to accord a favor to one in contempt, is clearly illustrated by the whole line of adjudicated cases." (167 U.S. at 423-24.)

Adverting to the problem specifically raised herein, this Court noted, quoting from *McKane v. Durston*, 153 U.S. 684, 687, that:

> " 'An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions[9] allowing such appeal.' " (167 U.S. at 443-44.)

And, immediately thereafter, this Court reserved opinion on the merits of the instant situation:

> "Whether in the exercise of its power to punish for a contempt a Court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defence, and where the one in contempt was an actor invoking the right allowed by the statute, is a question not involved in this suit." (167 U.S. at 444.)

The dismissal of petitioner's appeal here solely because of a failure to comply with an order to satisfy a substantial portion of the judgment appealed from

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[9]See *supra*, pp. 8-9, where the statutory provisions and Court rules respecting the right of appeal, relevant to the instant case, are quoted.

by posting bonds with a Court appointed receiver cannot be reconciled with the rationale of *Hovey v. Elliott.*

Concededly, *Hovey v. Elliott* did not involve the precise question here presented.[10] However, there seems to be no sound basis for failing to apply its reasoning here. The thrust of the decision appears to be that while the due process clause does not require the Courts "to accord a favor to one in contempt", it does require that before the property of a contemnor is taken he must be afforded "the right to defend in the principal case on the merits" (167 U.S. at 423-24).

Here there is no question of a "favor". As we have seen, the State of Washington by statute and court rule grants to all litigants the right to appeal from money judgments and its Supreme Court is required to hear all such appeals on the merits without any

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[10]Research has revealed only one case involving a motion to dismiss an appeal pending an adjudication of contempt. In *Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 F. 825 (CA 9, 1910), appellant had been adjudged an involuntary bankrupt upon a petition filed by its creditors; an appeal had been taken; and respondents moved to dismiss it upon the ground, *inter alia*, that "proceedings for contempt have been brought against the officers and attorneys of the [appellant], and pending such proceedings they are not entitled to any relief . . ." (177 F. at 834). The court denied the motion to dismiss the appeal (id.), citing from Beach on Modern Equity Practice:

> ". . . but the rule applies to matters of favor, and a party, although adjudged in contempt, may be heard on matters of strict right."

and from *Brinkley v. Brinkley*, 47 N.Y. 40:

> ". . . a party in contempt . . . will not be permitted to ask for a favor of the court, nor to take any aggressive proceedings against his adversary, but . . . it is his right to take measures to protect himself . . ."

reference to whether or not the appellant is in contempt.

The rationale of *Hovey v. Elliott* therefore applies with the greatest of force to this situation. For a judgment may be equally invalid whether it be granted by default in the first instance, or whether it be affirmed by default subsequently. In either case, a right to defend is destroyed and the party is deprived of his property without due process of law.[11]

Hovey v. Elliott has recently been followed *(Duell v. Duell,* 178 F. 2d 683 [CA DC, 1949]) and even extended to protect the right of intervention *(Deauville Associates v. Eristavi-Tchitcherine,* 173 F. 2d 745 [CA 5, 1949]). In the last cited case, the Court of Appeals said:

> "A litigant may be punished for contempt by fine or imprisonment, or both . . ., but the Court should not prescribe, as a means by which he should purge himself of such contempt, that its doors be closed to him in defense of either his liberty or his property." (173 F. 2d at 746.)

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[11]This is particularly true where, as here, the right to appeal is granted by statute. What would be the effect of a general statute authorizing or directing the dismissal of appeals for contemptuous conduct, either in general or of specified varieties, is not a question presented in this case. Compare *District of Columbia v. Clawans,* 300 U.S. 613, with *Hammond Packing Co. v. Arkansas,* 212 U.S. 332.

V.

THERE IS NO RATIONAL BASIS FOR THE DISMISSAL OF THE APPEAL BECAUSE OF THE FAILURE TO TURN MONIES OVER TO A RECEIVER.

Citing *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, respondents suggest (Brief in Opposition, 8-9) that the failure to turn over almost $300,000 to a receiver represented such an admission that the appeal was without merit as to justify its dismissal. There are several obvious answers to this suggestion.

In the first place, petitioner was litigating the validity of the order adjudicating it in contempt, and that litigation was not finally determined until—months after the judgment here under review was entered—this Court on November 6, 1953, dismissed, for want of a substantial federal question, petitioner's appeal from the contempt adjudication (346 U.S. 881.[12]

In the second place, by the time the contempt litigation had become final, the funds in the amount required were no longer available (R 34-36), having been spent either in the usual course of petitioner's business or in order to meet "relentless and extreme attacks" upon petitioner by a rival union with which these respondents were associated (R 37).

But more important than either of these two is the fact that whatever the reason for the failure to com-

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[12]That the litigation was not frivolous is seen by the fact that at least one member of this Court was of the opinion that probable jurisdiction should have been noted and by the further fact that the entire Court denied respondents' motion for damages and double costs (*National Union of Marine Cooks etc. v. Arnold*, 346 U.S. 881).

ply with the trial Court's order to turn over funds, no analogy can be drawn between such conduct and a failure to comply with an order to produce material evidence. In the one case no rational inference can flow respecting the merits of the case; in the other, such an inference is quite permissible. And this is the basic difference between *Hovey v. Elliott* (on which petitioner relies) and *Hammond Packing Co. v. Arkansas*, 212 U.S. 322.

In *Hammond* there was a state statute authorizing the striking of an answer upon the failure of a litigant to "appear and testify and produce any books, papers and documents . . ." (212 U.S. at 339, n. 1), "relating to the merits of any suit . . ." (212 U.S. at 336, n. 1).[13] Upon the defendant's failure to respond to the pretrial discovery proceedings instituted pursuant to the statute, its answer was stricken and a default judgment against it was entered. In affirming that judgment this Court placed great emphasis upon the reasonableness of a presumption that one who suppresses or conceals material evidence is likely to have no valid defense.

> "*Hovey v. Elliott* involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted

[13] As we have pointed out, there is no statute authorizing what was done here (*supra*, pp. 8-10).

right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause . . . [T]he generating source of the power was the right to create a presumption flowing from the failure to produce . . . In its ultimate conception, therefore, the power exercised below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law." (212 U.S. at 350-51).[14]

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[14]This basic difference between the *Hovey* and the *Hammond* cases has recently been recognized and restated: "The Hovey case holds it is a denial of due process to strip a defendant of his defenses as punishment for contempt. The Hammond opinion does not modify that rule; its holding is that, when a defendant has suppressed or failed to produce relevant evidence in his possession which he has been ordered to produce, a presumption arises as to the bad faith and untruth of his answer which justifies striking it from the record and rendering judgment as though by default." (*Duell v. Duell*, 178 F. 2d 683, 687.)

See the notes of the Advisory Committee on Rules respecting Rule 37, F.R.C.P.: "The provisions of this rule . . . authorizing judgments of dismissal or default for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with Hammond Packing Co. v. Arkansas . . . which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use as in Hovey v. Elliott . . . for the mere purpose of punishing for contempt."

See also *Peitzman v. City of Ilmo*, 141 F. 2d 956, 961 (CA 8, 1944), cert. den. 323 U.S. 718, reh'g. den. 323 U.S. 813.

This Court examined the prevailing opinions in the state Courts and noted how universally they supported the view it was taking,[15] and concluded:

> "As the power to strike an answer out and enter a default, conferred by [the statute] which is before us, is clearly referable to the undoubted right of the lawmaking authority to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation." (212 U.S. 353-54.)

Thus the inference of lack of merit in the defense was drawn solely from, and limited strictly to, the failure to produce material evidence. It was not sug-

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[15]Among the cases cited was *Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26, in which, many years ago, the Court below recognized the very distinction petitioner here urges between a punishment for contempt, on the one hand, and an inference of lack of merit in a defense arising from the failure to respond to discovery proceedings, on the other. That case involved a Washington statute similar to the Arkansas statute considered by this Court in the *Hammond Packing Company* case. In response to the argument that the striking of an answer and the entry of a default for failure to respond to interrogatories was a deprivation of property without due process of law, the Supreme Court of Washington said:

> "If the statute be construed as authorizing the striking of the answer and the taking of judgment by default, for failure to answer interrogatories, *solely as a punishment for contempt*, and without any regard to the substance of the interrogatories or the nature of the discovery sought, this objection would seem to be well taken." (44 Wash. at 32.)

The statute was sustained only upon the ground that a presumption of lack of merit could be indulged in upon failure "to make discovery of facts material to the support of the action or defense." (44 Wash. at 32-33.)

gested that such an inference would be permissible in the case of a contempt otherwise grounded. The inference in the *Hammond* case was permissible because there is a rational connection between a failure to produce evidence and a finding of lack of merit in a cause; the inference respondents seek to draw here, having no such rational basis in human experience, cannot be made without offending due process. *Manning v. Mutual Life Ins. Co.*, 100 U.S. 693; *McFarland v. American Sugar Ref. Co.*, 241 U.S. 79; *Morrison v. California*, 291 U.S. 82; *Maggio v. Zeitz*, 333 U.S. 56.

VI.

THE ORDER DISMISSING ITS APPEAL DENIED TO PETITIONER THE EQUAL PROTECTION OF THE LAWS.

In addition to depriving petitioner of its property without due process of law, the order below denied to it the equal protection of the laws. As we have seen, the laws of the State of Washington require appeals to be heard on the merits and do not suffer them to be dismissed for contempt—certainly not of the kind here shown. For the State Supreme Court to single out petitioner for special punishment is to invade its constitutional right to equality of treatment.

A statute fair on its face may nonetheless be invalid if applied unfairly. *Yick Wo v. Hopkins*, 118 U.S. 356. And the state action which brings about the constitutional condemnation may be the action of judicial

as well as executive officials. *Shelly v. Kramer,* 334 U.S. 1. Indeed, a litigant may well be denied the equal protection of the laws by the unfair operation of the state's appellate procedure. Cf. *Patterson v. Alabama,* 294 U.S. 600; *Cochran v. Kansas,* 316 U.S. 255.

So, here, the singling out of petitioner for the drastic punishment imposed, the departure by the state Court from the rules normally applicable to other litigants, the ignoring, in this case, of its own statutes, rules and decisions by the State Court, all add up to a denial to petitioner of that equal protection of the laws which the Fourteenth Amendment guarantees to it. Cf. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.[16]

Dated, San Francisco, California,
August, 1954.

NORMAN LEONARD,
Counsel for Petitioner.

GLADSTEIN, ANDERSEN & LEONARD,
Of Counsel.

(Appendix Follows.)

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[16]Although the only question now before this Court is whether the dismissal of its appeal deprived petitioner of the protections afforded it by the Fourteenth Amendment, and although on the merits the case is not presently here, it may be noted that the case against petitioners is far from concluded notwithstanding the affirmance of the judgment against its agent (*Arnold v. National Union of Marine Cooks and Stewards*, 144 Wn. Dec. 165).

Without presenting here the full argument which petitioner will make to the Court below, if it is permitted to do so, and the validity of which in the first instance must be passed upon by that Court, it may be observed that the recent decisions of this Court in *Garner v. Teamsters etc. Union*, 346 U.S. 485, and *Capital Service, Inc. v. NLRB*, 347 U.S. 501, raise serious questions respecting the jurisdiction of the State Court over the cause of action here.

The complaint here was based upon a claim that through its agent Harris, petitioner, a trade union, caused respondents to be

blacklisted by circulating to other unions letters charging respondents with having deserted the union. In passing upon the sufficiency of the complaint to state a cause of action for libel, the State Court observed:

> *"In the case at bar the letters in themselves would not be libelous if sent to the average individual. But, when we realize that they were sent to other unions which influenced or controlled the hiring of employees for work of appellants' usual occupation and that the names of all of the 97 appellants were attached to each letter, then the apparently harmless language takes on a more sinister meaning.* An official of a union influencing or controlling the hiring of employees would naturally become incensed when he received a letter containing a list of names of workers who, the letter charged, had deserted respondent union during the 1948 maritime strike and attempted to form a rival organization for the purpose of breaking the strike and destroying the union. *Although it is not directly suggested that these men be denied employment, the implication is clear."* (*Arnold v. National Union of Marine Cooks and Stewards,* 36 Wn. 2d 557, 562.)

However, as already indicated, *supra* p. 3, the National Labor Relations Board took jurisdiction over a charge alleging that this very blacklist constituted a violation of Section 8(b)(1)(A) of the Labor Management Relations Act (29 U.S.C.A. 158), so found, and issued a remedial order (*Pacific American Shipowners Association et al.*, 98 NLRB 582). The portion of the Board's decision and order relating to this matter is appended hereto for the information of the Court. The Board's order has been enforced by a consent decree of the Court of Appeals for the Ninth Circuit (*NLRB v. Pacific American Shipowners Association, et al.*, No. 13386, June 19, 1952).

Clearly, the *Garner* and *Capital Service* cases suggest that the Congress has preempted the field and that the State Courts have no jurisdiction over a cause of action, however entitled, based upon the interference with an employment relationship in interstate commerce. *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 657, at least leaves open the questions of whether the federal act's reinstatement and back pay provisions do not afford an exclusive remedy for interference with an employee's opportunity to obtain employment (347 U.S. at 665).

These questions, implicit in the demurrer filed by petitioner challenging the jurisdiction of the State Court over the subject matter of the action, are to be resolved in the first instance by the court below. They are adverted to here only to show that petitioner has a substantial argument to urge on its appeal—an argument it was never permitted to make because it was denied a hearing on the merits of its appeal.

Appendix

Excerpts from the decision and order of the National Labor Relations Board in *Pacific American Shipowners Association*, 98 NLRB 582:

"On April 11, 1949, Joseph C. Harris, port agent of the Seattle branch of the Respondent Union, sent a letter to Alaska Fishermen's Union (herein called AFU), which had a contract with with employers in the canning industry requiring union membership and clearance as a condition of employment, in which it referred to those named in an attached list as 'former members of the National Union of Marine Cooks and Stewards, who deserted this Union during the 1948 maritime strike and attempted to organize a dual organization under the leadership of the Sailors Union of the Pacific for the purpose of breaking our strike and destroying our Union.' It then impliedly suggested that those individuals be denied employment in the canning industry. Thereafter, several on this blacklist were unable to obtain work in the canning industry because of AFU's refusal, on account of the blacklist, to clear them.

"The Trial Examiner found, and we agree, that the Respondent Union violated Section 8(b)(1)(A) of the Act because of the black list which it sent to AFU. Section 7 of the Act guaranteed to those named in the blacklist the right to refrain from supporting the Respondent Union's 1948 strike activities, and to assist, instead, in the organizational activities of a labor organization of their choosing. As already found, several of those

individuals were deprived of employment as a result of the intervention on April 11 by the Respondent Union, because, having exercised the freedom of choice which Section 7 protects, they had fallen into disfavor with the Respondent Union. The rejection of their employment applications because of the Respondent Union's conduct made it unmistakably plain to the employees in question, and to the others named in the blacklist, that they must either regain good standing in the Respondent Union or forego opportunity for employment. In these circumstances, it is clear that the Respondent Union's effective blacklist restrained and coerced employees in the exercise of rights guaranteed by the Act. We accordingly find that the Respondent Union thereby violated Section 8(b)(1)(A) of the Act." (at 586) . . .

"Respondents [employers] . . . and National Union of Marine Cooks & Stewards, . . . shall jointly and severally make whole the employees named in Appendix A and Appendix B . . . for any loss of pay they may have suffered . . ." (at 614).

It is not insignificant that all but 5 of the 95 respondents here were parties to the Board proceeding and either received appropriate relief (98 NLRB 618-628) or had their cases dismissed because of failure of proof (98 NLRB 633).

In the Supreme Court
OF THE
United States

October Term, 1954

No. 19

National Union of Marine Cooks & Stewards, a voluntary association,
Petitioner,

vs.

George Arnold, et al.,
Respondents.

REPLY BRIEF FOR PETITIONER.

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OCTOBER TERM, 1954

No. 19

NATIONAL UNION OF MARINE COOKS & STEWARDS, a voluntary association,
Petitioner,

vs.

GEORGE ARNOLD, et al.,
Respondents.

REPLY BRIEF FOR PETITIONER.

I.

THE ABSENCE OF LEGISLATIVE SUPPORT FOR THE JUDGMENT BELOW IS PERSUASIVE THAT IT IS LACKING IN DUE PROCESS.

Respondents concede that the dismissal of the appeal by the court below, without granting petitioner a hearing on the merits, was not authorized by any act of the state legislature. (Respondents' Brief p. c. 8-9.)

Admittedly, therefore, the judgment below does not come to this Court "encased in an armor wrought by prior legislative deliberation." *Bridges v. California*, 314 U.S. 252-261.[1] In determining whether it offends the guarantees of the Fourteenth Amendment, a judgment devoid of such a legislative foundation is subject to closer scrutiny than might otherwise be the case.[2]

Furthermore, the dismissal of the appeal represents a departure not only from the legislative scheme existing in the State of Washington, but existing also in substantially all of the other states of the union.[3] While universality of legislation is not conclusive,

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[1]Indeed here, as in *Bridges v. California* (see 314 U.S. at 261, n. 3), the only evidence of the legislature's appraisal of the problem indicates a policy quite to the contrary of that followed by the court below. (See Brief for Petitioner, pp. 6-10, setting forth the applicable Washington statutes respecting the grounds for dismissal of appeals on the one hand and the limitations on the power to punish for contempt on the other.)

[2]In *Scott v. McNeal*, 154 U.S. 34, this Court reversed the decision of the Supreme Court of Washington which, without statutory authority, had permitted an administration of the estate of a missing person, subsequently determined to have been alive. This Court held that the due process clause of the Fourteenth Amendment forbade the assertion of jurisdiction in such a case. In *Cunnius v. Reading School District*, 198 U.S. 456, however, this Court upheld precisely the same action when it was based upon a statute enacted by the Pennsylvania legislature.

[3]*Alabama:* Code (1940), Title 19, Sec. 9; *Arkansas:* Statutes (1947), Secs. 34-901, 902; *California:* Code of Civil Procedure, Secs. 1209, 1318; *Connecticut:* General Statutes (1949), Sec. 7702; *Georgia:* Code (1933), Secs. 2-120; 24-104, 105; *Idaho:* Code (1947), Secs. 7-601, 610; *Indiana:* Statutes Annotated (1933), Sec. 2-4715; *Iowa:* Code (1954), Sec. 665.4; *Michigan:* Statutes Annotated (1935), Sec. 27.530; *Minnesota:* Statutes Annotated (1945), Sec. 588.02; *Mississippi:* Code (1942), Sec. 1656; *Missouri:* Vernon's Annotated Statutes (1949), Sec. 467.120; *Montana:* Revised Code (1947), Sec. 93.9810; *Nebraska:* Revised Statutes (1948), Sec. 25-2121; *Nevada:* Compiled Laws (1929), Sec. 8950-1; *New*

"it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v. Massachusetts, 291 U.S. 97." *Leland v. Oregon*, 343 U.S. 790, 798. This is especially so where, as here, the practice departed from is an ancient and venerable one,[4] for "the fact that a procedure is so old as to have been customary and well-known in the community is of great weight in determining whether it conforms to due process." *Anderson National Bank v. Luckett*, 321 U.S. 233, 244.

Even if the judgment below could be supported, as respondents seem to urge, on the basis of a presumption of lack of merit in the appeal, it has been generally held that the creation of such presumptions is not the function of Courts but of the legislatures. Cf. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350; *Carpenter v. Winn*, 221 U.S. 533; *Walter Cabinet Co. v. Russell*, 250 Ill. 416, 95 N.E. 462; *People v. Geo. Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304.

Jersey: Statutes Annotated (1940), Sec. 2:15-7; *New York:* Judiciary Law (1948), Secs. 750, 751, 753; *North Carolina:* General Statutes (1953), Secs. 5-1, 5-4; *North Dakota:* Revised Code (1943), Secs. 27-1003, 1004; *Ohio:* General Code (1938), Secs. 12137, 12142; *Oklahoma:* Statutes Annotated (1937), Title 21, Secs. 565, 566; *Pennsylvania:* Purdon's Statutes Annotated (1930), Secs. 17-2041, 2042; *Utah:* Code Annotated (1935), Secs. 78-32-1, 78-32-10; *Washington:* Revised Code (1951), Sec. 7.20.090; *Wisconsin:* Statutes (1953), Secs. 295.01, 295.02, 295.13.

[4]Most of the statutes (supra, n. 3) have been in the codes of the various states for many years. See also the discussion in *Hovey v. Elliott*, 167 U.S. 409, 415, 453, which contains a comprehensive review of the early authorities both in England and here.

II.

SINCE THE PROCEEDING BELOW WAS IN PERSONAM, THE EXPENDITURE OF THE FUNDS WAS NOT SUCH A FRUSTRATION OF THE COURT'S POWER AS TO JUSTIFY THE DISMISSAL OF THE APPEAL.

Respondents contend, however, that because in some cases (factually and legally quite different from the case at bar) an appeal may be dismissed without contravening constitutional guarantees, this may be done in all cases—or in any event it may be done in this one.

Thus, in reliance upon cases upholding the dismissal of criminal appeals where the defendant has fled the jurisdiction or of appeals in domestic relations cases where an appellant has removed minor children from the jurisdiction, respondents argue that the dismissal here does not offend due process. Respondents fail, however, to recognize the inherent differences between those cases and this.

In both the criminal and the domestic relations cases the appeals were dismissed not to punish appellants for contempt but because the act complained of destroyed the very basis for the Court's jurisdiction. In each case the very "corpus" of the action, so to speak, was the physical body of the prisoner or of the child: the removal of that corpus removed the *res* upon which the judgment of the Court could operate.[5] Certainly such a situation presents quite a dif-

[5]See for example *Casebeldt v. Butler*, 175 Ky. 381, 194 S.W. 305 (Respondents' Brief, p. 18) "[Appellant has taken the child] to another state, so that the orders of the court cannot be enforced against him"; *Bronk v. Bronk*, 46 Fla. 474, 35 So. 871 (Respond-

ferent question of due process—if it presents one at all—from the question posed in the case at bar.[6]

Here the judgment was not *in rem* as to any specific property, but was *in personam* only.[7] It created no obligation as to any specific bonds. It simply transferred what had been an inchoate tort claim into an obligation to pay a stated amount of money.[8] No specific monies were "earmarked" by the judgment, and therefore the expenditure by petitioner of any specific sum cannot be said to have destroyed the very corpus of the appeal, as was the situation in all of the cases relied upon by respondents.

Indeed, respondents recognize that not only was the petitioner a non-resident of the State of Washington, but that all of petitioner's assets of any sub-

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ents' Brief, p. 17): "The appellant . . . remains beyond [the court's] jurisdiction, and renders it powerless to enforce any decree"; *Spradling v. Spradling*, 74 Okla. 276, 181 Pac. 148: "[Appellant] absents himself and keeps beyond the jurisdiction of the court."

[6]Even in the criminal cases, the appeals will be heard when the petitioner subsequently returns or is apprehended. *Crawford v. State*, 94 Atl. 2d 605 (Del.). Cf. *Eisler v. United States*, 338 U.S. 189.

[7]Cf. *The Fred M. Lawrence*, 94 Fed. 1017 (CA 2), where the Court affirmed a decree taken *pro confesso* in an admiralty proceeding after the claimant to the attached vessel had failed to furnish adequate security. The opinion points out that the doctrine of *Covey v. Elliott*, 107 U.S. 409, does not apply because in the *in rem* proceeding "... the order that the libel be taken pro confesso was not a punishment, but was an order made upon the default of the claimant and her sureties . . . In a suit in admiralty *in rem* the vessel which is the offending thing is the defendant . . . The order . . . was not a punishment but was to enable the libelant to bring to an end a proceeding in rem in which through the default of the claimant it had neither res nor substitute." (Id. at 101.

[8]Cf. *Freeman on Judgments*, 5th Ed., Vol. 1, pp. 5, 25, 170; Vol. 2, pp. 1925, 1955, 1973.

stance were always situated in California (Respondents' Brief, pp. 5-15; TR 45), and that the very bonds in question never were in the State of Washington. (Respondents' Brief, p. 4; TR 13-14.) Thus respondents' view is that a non-resident may, consistently with due process, be compelled either to supersede or to bring its foreign property into the jurisdiction in satisfaction of a judgment upon the pain of forfeiting its statutory right to appeal. This would appear to be contrary to this Court's teaching in *Pennoyer v. Neff*, 95 U.S. 714, and in any case clearly points up the difference between the due process questions posed in this case on the one hand, and in the cases relied upon by respondents on the other. For in these criminal and divorce cases not only was there a specific *res* upon which the judgment operated and the destruction of which destroyed the jurisdiction of the court, but the *res* in question had always—until the wrongful act complained of—been within the jurisdiction of the court, whereas here the bonds never had been.

III.

THE PRESUMPTION PERMITTED BY HAMMOND PACKING CO. v. ARKANSAS, 212 U.S. 322, IS NOT PERMISSIBLE HERE.

Respondents urge that the failure to deposit the bonds represents such an admission of lack of merit in the appeal as to support the judgment below. (Respondents' Brief, pp. 22-23.) Their reliance in this regard upon *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, and *Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26, 86 Pac. 1120, is ill-founded for the reasons already stated. (Brief for Petitioner, pp. 16-20.) The *Hammond* and *Lawson* cases involved *statutory* presumptions of lack of merit in a cause or a defense based upon the *failure to produce competent and relevant evidence* in relation thereto. Due process is not offended in such a case only because the presumption indulged in is a rational one. So conscious have the Courts been of the necessity of limiting their holdings to this rationale that when a cause of action or a defense is divisible and the failure to discover runs only to a portion thereof, that portion only is stricken and the party is permitted to proceed with what remains. *Feingold v. Walworth Bros.*, 238 N.Y. 446, 144 N.E. 675; *People v. George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304.[2]

The presumption respondents seek to create is utterly artificial. Not only as heretofore pointed out

[2]In general the Courts have been most cautious in exercising the stringent powers given under these statutes. Cf. *Vecchia v. Fairchild Engine and Airplane Corp.*, 171 Fed. 2d 610 (CA 2); *Producers Releasing Corp. de Cuba v. PRC Pictures*, 176 F. 2d 93 (CA 2), and the state cases collected in 144 ALR 383-388.

(Brief for Petitioner, p. 16) was petitioner litigating the validity of the contempt order, but, since the order to transfer the bonds was not appealable under the state practice (*State ex rel. Mangaoang v. Superior Court*, 30 Wash. 2d 692, 193 Pac. 2d 318) the method employed by petitioner was a legitimate one for testing the validity of the order requiring it to turn over the bonds. *State ex rel. Mangaoang v. Superior Court*, supra. Certainly a litigant cannot be said to lack such faith in its appeal as to justify its dismissal because it refuses to comply with the first order of a *nisi prius* judge to turn over more than three-quarters of its total assets[10] to a receiver while it is litigating the validity of both the underlying judgment and the turnover order. This is quite different from refusing (in the face of a statutory command) to provide information necessary to the orderly determination of a lawsuit.[11]

Neither case nor statute has been found which lends any support to respondents' theory that a presumption of lack of merit may be indulged in because of a failure to turn over money while litigation is pending. To

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[10]Respondents allege that in September 1951 petitioner had approximately $360,000 in assets, of which the bonds sought totaled $298,000. (Tr. 45.)

[11]". . . It does not follow at all that *Hovey v. Elliott*, which related to an incidental order for payment of money into court, and not at all to a preparation of the pleadings for a proper understanding of the suit . . . applies to this case." *Young & Holland Co. v. Brande Bros.*, 162 F. 663, 664 (CA 1).

Cf. *Wittenberg Coal Co. v. Compagnie Havrasie Peninsularie*, 22 Fed. 2d 904, 905 (CA 2). "The refusal to answer the interrogatories is more than a contempt. It was a failure to give information which the appellee was entitled to under the rules in admiralty."

the contrary, *Exploration Mercantile Co. v. Pacific Hardware & Steel Co.*, 177 Fed. 825 (CA 9), (Brief for Petitioner, p. 14, n. 10), denied a motion to dismiss a pending appeal because of a contempt which consisted in a violation (while the litigation was pending) of a Court order enjoining the sale and distribution of the property or estate of a bankrupt. *Morehouse v. Pacific Hardware & Steel Co.*, 177 F. 377 (CA 9); *Morehouse v. Giant Powder Co.*, 206 F. 24 (CA 9).

IV.

THE RIGHT TO APPEAL ALLOWED TO OTHER PERSONS MAY NOT BE TAKEN FROM PETITIONER.

The cases cited for the broad proposition that "due process does not comprehend the right of appeal" (Respondents' Brief, p. 10), do not upon analysis appear to require affirmance of the judgment below for none of them presented the question here involved.

District of Columbia v. Clawans, 300 U.S. 613, involved only the question of the denial of a right to a jury trial for petty offenses and the language quoted by respondents was not necessary to a determination of that issue.

Reetz v. Michigan, 188 U.S. 505, involved a conviction for practicing medicine without a license. There was an appeal from the conviction, appellant contending that the determination of the Board of Medical Examiners on his competency to practice was invalid because not subject to judicial review. All this

Court said was that nothing in the Fourteenth Amendment prevented a state from granting to an administrative tribunal the power to make final determination of such question. *Pittsburg etc. v. Backus*, 154 U.S. 421, involved an action to restrain the collection of taxes. On appeal from the lower court's order against the taxpayer, the contention that the tax determination was invalid because there was no review of the action of the Board of Tax Commissioners was all that was involved. The case is similar in principle to *Reetz v. Michigan, supra*, and is not dispositive of the issue here.

In *McKane v. Durston*, 153 U.S. 684, an appeal was taken from a conviction in the state court. While that appeal, which was allowed, was pending, a habeas corpus proceeding was brought in the Federal Court seeking release on bail pending appeal. Nothing was determined except that the Fourteenth Amendment did not require a state to release an appellant on bail under such circumstances.

To the contrary of all the foregoing, the question at bar is whether once a statutory right to appeal is granted a court may nonetheless (and in the absence of a statute authorizing the dismissal of the appeal upon the grounds here invoked) single out petitioner and punish it by dismissal of its appeal for a contempt unrelated to the merits of the cause. In addition to the cases already cited (Brief for Petitioner, p. 11, n. 7, p. 21), the following suggest that the due process clause of the Fourteenth Amendment requires a reversal of the judgment below: *State ex rel. Hahn*

Bakery Co. v. Anderson, 269 Mo. 381, 190 S.W. 857;[12] *Dowd v. United States*, 340 U.S. 206.[13]

V.

THE COURT BELOW LACKED JURISDICTION OF THE CAUSE OF ACTION.

As we pointed out in our opening brief (p. 22, n. 16), the only question now before the Court is whether the dismissal of the appeal deprived petitioner of the rights guaranteed to it by the Fourteenth Amendment; the correctness of the ruling of the court below in assuming jurisdiction over this cause of action in the light of this Court's decisions in *Garner v. Teamsters Union*, 346 U.S. 45, and *Capital Service Inc. v. NLRB*, 347 U.S. 501, is not presently before the Court. Respondents' contention that the entire matter is put at rest by *United Construction Workers v. Laburnum Construc-*

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[12] "For while the right of appeal is not essential to due process of law, yet if an appeal be allowed to some persons and not to all persons similarly situated, such a deprivation of the right to an appeal is equivalent to the denial of due process of law . . ." (269 Mo. at 385, 190 S.W. at 858.)

[13] "In this Court the State admits, as it must, that a discriminatory denial of the statutory right of appeal is a violation of the Equal Protection Clause of the Fourteenth Amendment. Cochran v. Kansas, 316 U.S. 255 . . . The Fourteenth Amendment precludes Indiana from keeping respondent imprisoned if it persists in depriving him of the type of appeal generally afforded those convicted of crime." (340 U.S. at 208.) Cf. *Frank v. Mangum*, 237 U.S. 309, 327, where this Court said that while the Fourteenth Amendment did not require the state to provide an appeal, "it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as part of a process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment."

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OCTOBER TERM, 1953

NATIONAL UNION OF MARINE COOKS AND STEWARDS,
a voluntary association, *Petitioner*,

vs.

GEORGE ARNOLD, *et al.*, *Respondents.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 529

Supreme Court of the United States

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vs.

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The order of the state court toward which the petition for certiorari is directed (R. 53) has not been reported. However, three opinions have been published on different phases of the case (36 Wn.(2d) 557, 219 P.(2d) 121; 41 Wn.(2d) 22, 246 P.(2d) 1107; 142 Wash. Dec. 590, 257 P.(2d) 629) and another opinion, filed February 2, 1954, will very shortly be published in Volume 144 of the Washington Supreme Court advance sheets.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C., Section 1257(3). Petitioner's theory is that a "right, privilege or immunity" was "specially set up or claimed under the Constitution" of the United States. We submit that petitioner did not adequately set up or claim the federal rights it now argues.

For a claim of federal right, petitioner relies primarily upon a brief filed in the State Supreme Court May 15, 1952 (Petition, page 2, referring to R. 17, 22). The closest thing to a claim of federal right in that brief is the following statement:

> "We doubt that there is inherent power to deny a person in contempt the right to defend an action against him, for this would involve the taking of his property without due process of law, in violation of the Fourteenth Amendment. See: *Peters v. Berkeley* (1927) 219 N.Y.S. 709; *Maran v. Maran* (1910) 122 N.Y.S. 9. The rule does not apply when the interest of more than the person in contempt would be involved."

The above-quoted statement is not one in which petitioner "unmistakably declares that he invokes, for the protection of his rights, the Constitution * * * of the United States." Such a declaration is essential to raise a federal question and preserve it for review. *Michigan Sugar Co. v. Michigan*, 185 U.S. 112, 22 S. Ct. 581, 46 L.ed. 829. More particularly, petitioner did not make such a declaration as to the claims it now urges.

The statement made by petitioner to the state court is not only equivocal, but it is an inadequate generalization. Petitioner *was* accorded "the right to defend" in the trial court. To admit the generalization is only to beg the question. How was petitioner denied "the right to defend" guaranteed by the Fourteenth Amendment? The last quoted sentence inserts a greater ambiguity, particularly when read with the succeeding paragraph of the brief in which the quotation is contained:

"Respondents seek not only to dismiss appellant union's appeal, or strike its brief, but they also want to deny appellant Harris, his appellate remedies. This is improper, since appellant Harris is not in contempt. Further, to strike appellant union's brief would necessarily require the striking of appellant Harris' brief."

Thereafter, the foregoing statement became irrelevant, because only the appeal of petitioner was dismissed (R. 53) and the appeal of Harris was separately docketed for hearing (R. 52).

In a footnote (Petition, p. 2) petitioner refers to later briefs filed by it in the State Court to show that it made a claim of federal right. Assuming that with the aid of these briefs a proper and timely claim under the due process clause of the Fourteenth Amendment to the Federal Constitution can be pieced out to support the present due process argument, it certainly cannot be said that the equal protection clause was invoked, because it was not mentioned at all, so far as we find, except in the following paragraph of a brief filed June 13, 1952 (R. 26, at 28):)

"Respondents' contention is that the Supreme Court should strike appellants' appeal from the judgment of $475,000.00 against them, because appellant union has been adjudged guilty of contempt in superior court. Then, respondents contend, without inquiring as to whether there was jurisdiction or justification for the superior court adjudication, this court should enter its own coersive order in contempt proceedings without receiving any evidence, or conducting any hearing —without even making a determination as to whether the bonds to be transferred are, or have

been, at any time material to this proceeding, in the possession or control of either of appellants. Such action, if pursued by this court, would deprive appellants of property without due process of law, and deny them equal protection of the law: *Hovey v. Elliott* (1896) 167 U.S. 407, 17 S. Ct. 841, 43 L.ed. 215."

This statement became irrelevant because the state Supreme Court refused to act upon the motion for dismissal of the appeal until the contempt adjudication had been reviewed and affirmed (R. 23-24).

We understand that "this court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented." *People ex rel. Cohn v. Graves*, 300 U.S. 308, 81 L.ed. 666, 57 S.Ct. 466. This rule has peculiar force when applied to review of state court decisions as to the validity of state legislation (*Wilson v. Cook*, 327 U.S. 474, 90 L.ed. 793, 66 S.Ct. 663), and the same considerations enter here, where action of the highest court of the state, governing a remedy in that court, is under attack.

ADDITIONAL STATEMENT OF THE CASE

September 4, 1951, the 95 respondents recovered judgment in the total amount of $475,000.00 against petitioner and Joseph Harris, its agent (R. 1-8). Petitioner and Harris appealed but did not supersede (R. 12) and the judgment was therefore enforceable pending appeal. Revised Code of Washington (R.C.W.), Section 4.88.060, Laws of 1893, C. 61, Section 7; Rules on Appeal, Vol. 34A Wash. Reports, Rule 25, p. 27; *Cunningham v. Mitchell*, 126 Wash. 294, 218 Pac. 386; *Ryan v. Plath*, 18 Wn.(2d) 839, 140 P.(2d) 968.

In supplemental proceedings looking toward enforcement of the judgment, a receiver was appointed and petitioner was directed to transfer certain bonds to the receiver, all as specifically authorized by statute. R.C.W., Section 6.32.290, Laws of 1893, C. 133, Section 28; and R.C.W., Section 6.32.080, Laws of 1893, C. 133, Section 8. It was not proposed that the receiver disburse the proceeds of these bonds, or distribute the bonds, but that the bonds be held by the receiver pending the outcome of the appeal from the money judgment (R. 49). Petitioner failed to comply with the order and was adjudicated in contempt (R. 9). Upon appeal the contempt adjudication was affirmed and the court ordered that the appeal from the money judgment be dismissed unless petitioner purge itself within 15 days (42 Wn.(2d) 648, 257 P.(2d) 629). Petitioner having failed to purge itself, the appeal was dismissed (R. 53).

Petitioner appealed to this court from the decision of the state Supreme Court affirming the adjudication

tion Corp., 347 U.S. 657 (Respondents' Brief, pp. 28-30) is not well taken since that very case leaves open the question of whether the reinstatement and back pay provisions of the Labor Management Relations Act of 1947, 61 Stat. 163, 29 USC 141, et seq., do not afford an exclusive remedy for interference with an employee's opportunity to obtain employment.

That the scope of the area pre-empted by the federal legislation is still uncertain is seen by the fact that at least five petitions for writs of certiorari are presently pending in this Court in cases involving this or closely related questions.[14]

CONCLUSION.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed.

Dated, San Francisco, California,
October 8, 1954.

Respectfully submitted,
NORMAN LEONARD,
Counsel for Petitioner.

GLADSTEIN, ANDERSEN, LEONARD & SIBBETT,
Of Counsel.

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[14] All October Term, 1954: *Weber v. Anheuser Busch Inc.*, No. 97 (265 S.W. 2d 325 [Mo.]); *General Drivers Etc. Union v. American Tobacco Co.*, No. 186 (264 S.W. 2d 250 [Ky.]); *Amalgamated Clothing Workers v. Richman Bros. Co.*, No. 173 (211 F. 2d 443 [CA 6]); *Rors v. Lambe*, No. 278 (213 F. 2d 407 [CA 9]); cf. *Harris v. Batt'e*, No. 111 (Va.).

of contempt and directing that petitioner's appeal from the money judgment be dismissed unless it purge itself within 15 days. The appeal to this court was dismissed November 16, 1953, for lack of a substantial federal question. *National Union, etc. v. Arnold, et al.*, 346 U. S. 881, 98 L.Ed. (Ad. Op.) 80, 74 S.Ct. 136.

While petitioner and Harris had taken a joint appeal to it, the Washington Supreme Court refused to dismiss the whole appeal but separately docketed the Harris appeal for argument (R. 52). Upon the Harris appeal the money judgment was affirmed February 2, 1954. The opinion will be published in Vol. 144 of the Washington Supreme Court advance sheets.

Since certiorari is discretionary, we believe this court should know that, while all of the foregoing has been going on, petitioner has staved off suit in California on the theory that the Washington judgment has not been final pending appeal, and that petitioner has so dissipated its assets that its apparent assets do not amount to a fraction of the judgment (R. 45).

REASONS FOR DENYING THE WRIT

1. Petitioner Did Not Raise the Federal Questions It Now Argues:

For the reasons already mentioned under discussion of this court's jurisdiction, no federal question, presently urged, was adequately raised by petitioner.

2. Petitioner Made No Claim to Support Its Present Argument that It Has Been Denied Equal Protection of Laws:

As we have pointed out in our discussion of jurisdiction, if any Federal question now argued by petitioner was adequately raised, it was only the due process question, and petitioner's present argument under the equal protection clause is not supported by an adequate claim in the state court.

3. Due Process Does Not Embrace the Right of Appeal:

To invoke the due process clause, petitioner now contends that deprivation of its right of appeal denies it due process. This is groundless, because "due process does not comprehend the right of appeal." *District of Columbia v. Clawans*, 300 U.S. 613, 81 L.Ed. 843, 847, 57 S.Ct. 660.

12 Am. Jur. 328, Section 638;

Reetz v. Michigan, 188 U.S. 505, 47 L.ed. 563, 23 S.Ct. 390;

Pittsburgh C.C. and St. Louis R.R. Co. v. Backus, 154 U.S. 421, 38 L.ed. 1031, 14 S.Ct. 1114;

McKane v. Durston, 153 U.S. 684, 38 L.ed. 867, 14 S.Ct. 913.

Petitioner does not claim that it was denied a full hearing in the trial court. In fact, there was a full dress jury trial during which petitioner was represented by able counsel.

By express declaration of the court, *Hovey v. Elliott*, 167 U.S. 409, 444, 42 L.ed. 215, 230, 17 S.Ct. 841, upon which petitioner relies, is not applicable here:

> "Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit. The right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt involved an essential element of due process of law, and our opinion is therefore exclusively confined to the case before us."

4. The Contempt May Be Treated as a Conclusive Admission of Lack of Merit in Petitioner's Appeal:

Respondents argued to the State Supreme Court that petitioner's contempt was a conclusive admission that its appeal was without merit, since it would not deliver assets to an officer of the court for safe keeping (R. 48-49). The order of the court would simply have preserved the assets in question until the outcome of petitioner's appeal. Respondents proposed this (R. 49), and, aside from respondents' proposal, a receiver would not of course pay a judgment which was subject to appeal, unless he should be authorized

to take over the appeal and should decide that the appeal was without merit, and then only with court approval. The receiver was not authorized to take over any assets or functions of petitioner except to receive $298,000.00 in Government bonds (R. 14-16). The flagrant violation of such an order is a rather obvious admission that the appeal was without merit, because petitioner was willing to place itself in contempt to avoid staking any of its assets on the outcome of its appeal. Full force and effect may be given to such an admission, even where (not as here) the result is to deny a hearing altogether.

Hammond Packing Co. v. Arkansas, 212 U.S. 322, 53 L.ed. 530, 29 S.Ct. 370;

Lawson v. Black Diamond Coal Mining Co., 44 Wash. 26, 86 Pac. 1120.

5. Petitioner Has Not Been Denied Equal Protection of Laws:

Assuming, for argument, that this question has been raised, there is no reason to suppose that petitioner has been arbitrarily classified nor that other appellants who place themselves in petitioner's position of contempt will not be treated in the identical way that petitioner has been treated.

Equal protection does not mean indiscriminate operation of laws, and persons in various relations may be variously treated. *Magoun v. Illinois Trust etc. Bank*, 170 U.S. 283, 42 L.ed. 1037, 18 S.Ct. 594. Things which are different in fact or opinion need not be treated as though they were the same. *Tigner v. Texas*, 310 U.S. 141, 84 L.ed. 1124, 60 S.Ct. 879. The clause

means that the rights of all persons rest on the same rule under similar circumstances. *Hartford Steam Boiler Inspection and Insurance Co. v. Harrison*, 301 U.S. 459, 81 L.ed. 1223, 57 S.Ct. 838. The right to equal protection is not denied when the same law or course of procedure is applicable to any other person under similar circumstances and conditions. *Tinsley v. Anderson*, 171 U.S. 108, 43 L.ed. 91, 18 S.Ct. 805.

It is apparent that the state court's rule of decision does not single out petitioner in an arbitrary or whimsical manner, nor does it create an arbitrary or whimsical classification including petitioner.

CONCLUSION

The rule of decision applied to petitioner bears a reasonable relation to legitimate state interests. The relationship has been forcefully, if not shockingly, presented by petitioner's conduct and contentions. Petitioner has demonstrated a most sensitive awareness of its own legal rights. On the other hand, it obviously does not conceive that they are relative. And it is apparently blind to the concept that the enforcement and collection of judgments are parts of due process of law. By flaunting the state court's order for delivery of assets to the court-appointed receiver and by dissipating its assets pending appeal, it has attempted to make it impossible for respondents ever to enforce and collect their judgment. The violation of the court's order for delivery of bonds was a contemptuous interference with due process of law. Petitioner's Constitutional rights must be respected, but, as we suggested to the state Supreme Court, petitioner has no Constitutional right to emasculate the judicial system.

Respectfully submitted,

SAMUEL B. BASSETT,
Counsel for Respondents.

JOHN GEISNESS,
Of Counsel.

No. 19

Supreme Court of the United States

OCTOBER TERM, 1954

NATIONAL UNION OF MARINE COOKS AND STEWARDS, a voluntary association, *Petitioner,*

vs.

GEORGE ARNOLD, *et al.,* *Respondents.*

BRIEF OF RESPONDENTS

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NATIONAL UNION OF MARINE COOKS AND STEWARDS, a voluntary association, *Petitioner*, vs. GEORGE ARNOLD, *et al.*, *Respondents.*	No. 19

BRIEF OF RESPONDENTS

OPINIONS BELOW

The State Court action under review (R. 53) is unreported. Four opinions have been published on other issues (36 Wn.(2d) 557, 219 P.(2d) 121; 41 Wn.(2d) 22, 246 P.(2d) 1107; 42 Wn.(2d) 648, 257 P.(2d) 629; 144 Wash. Dec. 165, 265 P.(2d) 1051).

JURISDICTION

We do not find that the question now raised by petitioner under the Equal Protection Clause of the Fourteenth Amendment was ever "specially set up or claimed" below. So far as we find, the Equal Protection Clause was not mentioned, except in a brief filed June 13, 1952 (R. 26, at 28). The question there raised is not the question argued now by petitioner.

ADDITIONAL STATEMENT OF THE CASE

This action is one to recover damages for libel, a common law tort. *Arnold v. National Union of Marine*

Cooks and Stewards, 36 Wn.(2d) 557, 219 P.(2d) 121, and 144 Wash. Dec. 165, 265 P.(2d) 1051. Special damages were not alleged. *Arnold v. National Union of Marine Cooks and Stewards*, 36 Wn.(2d) 557, 219 P.(2d) 121. The case was tried to a jury which returned a verdict awarding $5,000 to each of the 95 plaintiffs who are respondents here. September 4, 1951, judgment was entered on the verdict. This judgment runs against petitioner and Joseph Harris (R. 1-8). Petitioner and Harris appealed but did not supercede (R. 12) and the judgment was therefore enforceable pending appeal. Revised Code of Washington (R.C.W.), Section 4.88.-060, Laws of 1893, C. 61, Section 7; Rules on Appeal, Vol. 34A Wash. Reports, Rule 25, p. 27; *Cunningham v. Mitchell*, 126 Wash. 294, 218 Pac. 386; *Ryan v. Plath*, 18 Wn.(2d) 839, 140 P.(2d) 968.

In supplemental proceedings looking toward enforcement of the judgment, a receiver was appointed and petitioner was directed to transfer certain bonds to the receiver, all as specifically authorized by statute. R.C.W., Section 6.32.290, Laws of 1893, C. 133, Section 28; and R.C.W., Section 6.32.080, Laws of 1893, C. 133, Section 8. It was not proposed that the receiver disburse the proceeds of these bonds, or distribute the bonds, but that the bonds be held by the receiver pending the outcome of petitioner's appeal from the money judgment (R. 49). It has never been claimed that petitioner did not possess the bonds at the time the order directing transfer was entered. Petitioner failed to comply with the order, and, after notice and hearing, was adjudicated in contempt (R. 9). Upon appeal the con-

tempt adjudication was affirmed and the Court ordered that the appeal from the money judgment be dismissed unless petitioner purge itself within 15 days (*Arnold v. National Union of Marine Cooks and Stewards*, 42 Wn. (2d) 648, 257 P.(2d) 629). Petitioner having failed to purge itself, the appeal was dismissed July 3, 1953 (R. 53).

Petitioner appealed to this Court from the decision of the State Supreme Court affirming the adjudication of contempt and directing that petitioner's appeal from the money judgment be dismissed unless it purge itself within 15 days. The appeal to this Court was dismissed November 16, 1953, for lack of a substantial federal question. *National Union, etc., v. Arnold, et al.*, 346 U.S. 881, 98 L.Ed. (Advance p. 80), 74 S.Ct. 136.

While petitioner and Harris had taken joint appeals (R. 50, 19, 21, 39), the Washington Supreme Court refused to dismiss the Harris appeal and separately docketed his appeal for argument (R. 52). Upon the Harris appeal the money judgment was affirmed February 2, 1954. *Arnold v. National Union of Marine Cooks and Stewards*, 144 Wash. Dec. 165, 265 P.(2d) 1051.

We believe the problem presented to the Washington Supreme Court may most appropriately be shown by excerpts from affidavits submitted to that Court.

April 2, 1952, there was filed an affidavit reading in part as follows (R. 13-14):

> "Said voluntary association has altogether failed and refused, and still fails and refuses, to deliver to said receiver said bonds or any part of said

bonds, and has given no explanation to said receiver or to the court or to said plaintiffs in said cause or their counsel for its failure to comply with said order.

"The failure of said association to comply with said order is frustrating enforcement of the judgment which is the subject of the above appeal and is frustrating the receivership created and existing in said case in said superior court by virtue of said order of said court.

"On or about the 4th day of April, 1952, said superior court made its order adjudicating said association in contempt of court for failure to deliver said bonds and further adjudicating that said defendants' contemptuous conduct frustrates the enforcement of said judgment and frustrates the receivership created by the court's order.

"Said bonds are, and at all times mentioned herein, have been, situated in San Francisco, California. Said bonds are in the custody and under the control of officers of said association who reside in California and are beyond the jurisdiction of said superior court. Said association has no substantial assets within the jurisdiction of said superior court and its only assets within such jurisdiction consist of furniture and equipment used in its offices and hiring hall in Seattle, Washington. Said superior court is unable to exercise such coercive power against such association as to compel delivery of said bonds and said association is contemptuously ignoring the aforementioned orders of such superior court."

June 12, 1953, respondents filed a further affidavit reading in part as follows (R. 45):

"The appellants have altogether failed to de-

posit Government bonds in the amount of $298,000.00, or any other securities, money, or other property with the receiver appointed by the Superior Court of the State of Washington, and have not, in whole or in part, purged themselves of the contempt mentioned in the opinion and order entered upon the appeal to this Court in the above-entitled cause, under number 32180. In said cause number 32180, before this Court, the remittitur went down May 26, 1953, and has never been recalled.

"An emergency exists because the appellant union is rapidly dissipating its assets. On September 26, 1951, said appellant owned cash and liquid securities in the approximate amount of $360,011.58, according to its own financial report. According to a report published by said appellant under date of March 13, 1953, said appellant, during 1952, expended approximately $200,000.00 more than it received and its 'cash assets' (broadly described in said report as 'cash, investments, etc.') amounted to only $90,389.00 at the end of 1952. All of its assets of substantial value are in California and two California courts have refused to entertain suit on the Washington judgment while this appeal is pending. The other appellant has no known assets and certainly has no assets of material value in relation to the amount of the judgment herein. Nothing whatsoever has been paid upon said judgment."

These allegations are undenied, except that petitioner claims that the undenied reduction in assets was not "dissipation" (R. 37-38).

SUMMARY OF ARGUMENT

The Superior and Supreme Courts of the State of Washington are constitutional courts with inherent powers to discharge their duties as trial and appellate courts of general jurisdiction. The Legislature may not impair these powers and the failure of the Legislature specifically to authorize the action taken in the instant case does not negative the power of the Court to take such action. Washington State Constitution, Article IV; *Blanchard v. Golden Age Brewing Co.*, 164 Wash. 140, 2 P.(2d) 79.

Petitioner's due process rights were exhausted by jury trial; "Due process does not comprehend the right of appeal." *District of Columbia v. Clawans*, 300 U.S. 613, 627, 81 L.Ed. 843, 847, 57 S.Ct. 660. The basis upon which the court in *Howey v. Elliott*, 167 U.S. 409, 42 L. Ed. 215, 17 S.Ct. 841, distinguishes *Allen v. Georgia*, 166 U.S. 138, 41 L.Ed. 949, 17 S.Ct. 525, carries the clear implication that denial of a right of appeal for contempt is not *ipso facto* violative of the Due Process Clause. Restriction of a right of appeal for contempt may be reasonable in its impact and then raises no question under the Due Process Clause.

The contempt occurred in the same case as the appeal dismissal. Petitioner did nothing to purge itself. There was no possible action reasonably calculated to vindicate the Court's authority and coerce compliance except the conditional appeal dismissal. The Fourteenth Amendment does not force the Washington Court to accept petitioner's proposal that it be allowed to prosecute its appeal, use the pendency of the appeal to defeat

action upon the judgment in California, meanwhile dissipating its assets to make the judgment an empty right. The justification for dismissal of an escaped criminal's appeal justifies dismissal here.

If petitioner had faith in its appeal it would not reduce the judgment to sham by contumacious dissipation of its own assets. By giving such an admission conclusive effect no due process right is violated. *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 53 L.Ed. 530, 29 S.Ct. 370.

Petitioner was actually heard upon the appeal through its co-appellant Harris whose only interest in the appeal was to act as virtual representative of petitioner. *Arnold v. National Union of Marine Cooks and Stewards,* 144 Wash. Dec. 165, 265 P.(2d) 1051.

The equal protection claim now argued was never urged before the state courts and is not available to petitioner. If it is available to petitioner, there is no substance to the claim because there is nothing to suggest that all appellants who place themselves in petitioner's position will not be treated in exactly the same way as petitioner, nor that the same principle applied to petitioner will not be applied to all appellants. The fact that some people are allowed to appeal and some people are not does not deny equal protection, unless arbitrary distinctions are imposed.

The federal preemption argument petitioner proposes to make to the State Supreme Court is without substance. This is a common law tort action for libel, and the remedy does not overlap the National Labor Relations Board remedy. The instant case is further

removed from the preempted field than *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 657, 98 L.Ed. (Advance, p. 686), 74 S.Ct. 833.

ARGUMENT

The Action Taken by the State Supreme Court Was Within Its Inherent Powers

It is contended by petitioner that the dismissal is not authorized by State law. This suggestion is based upon the theory that the dismissal is not authorized by the State statutes governing appeals and contempts.

The Supreme and Superior Courts of the State of Washington are constitutional courts. Washington State Constitution, Article IV. They have the inherent powers of courts of general jurisdiction and the Legislature may not impair their powers to discharge their duties as constitutional courts. *Blanchard v. Golden Age Brewing Co.*, 164 Wash. 140, 2 P.(2d) 79. Many Washington decisions defer to legislative regulation of court business and leave the impression that the Washington courts have no greater immunity from legislative interference than such courts as are products of legislative enactment. The *Blanchard* case makes clear that judicial deference to legislative regulation of the Washington Superior and Supreme Courts in the discharge of their judicial duties is a matter of comity and that those Courts need not submit to any such regulation, and will not submit to any that is unreasonable.

The action of the Washington Supreme Court was designed to vindicate the authority of the courts and effectuate the judgment and order of the Superior

Court; it was designed to effectuate due process upon the plea of respondents who were trying to collect their judgment by due process of law. These are the proper functions of contempt proceedings. *Texas v. White (In re Chiles)*, 89 U.S. (22 Wall.) 157, 22 L.Ed. 819. Courts have inherent power to effectuate their judgments; courts have inherent power to command respect for their orders. 14 Am. Jur. 370, Sec. 171; 14 Am. Jur. 373, Sec. 174. Therefore, the Legislature could not have divested the Supreme Court of the State of the power to act as it did, even if the Legislature had expressly prohibited dismissal of appeals under such circumstances as we find here. Of course, the Legislature has not done this.

A similar argument was made in *MacPherson v. MacPherson* (Calif.) 89 P.(2d) 382, where an appellant contended a statute providing penalties for contempt limited the power of the Court, and the Court said:

> "This statute will not be construed to infringe upon the court's inherent powers to ignore the demands of litigants who persist in defying the legal orders and processes of this state."

The Washington Supreme Court has in the past dismissed appeals in criminal cases where the appellant became a fugitive from justice during the pendency of his appeal. *State v. Handy*, 27 Wash. 469, 67 Pac. 1094; *State ex rel. Soudas v. Brinker*, 128 Wash. 319, 223 Pac. 615. And the appeal of a mother deprived of custody of her children was dismissed because, pending the appeal, she contumaciously concealed them. *Pike v. Pike*, 24 Wn.(2d) 735, 167 P.(2d) 401. Statutes did not authorize these dismissals.

It is plain that the Washington Supreme Court is not confined to dismissals supported by statutory authority.

Petitioner Was Not Denied Procedural Due Process

Petitioner was given ample notice and a jury trial with full right to be heard by an impartial jury and judge. This exhausted petitioner's procedural rights under the Due Process Clause, because, "Due process does not comprehend the right of appeal." *District of Columbia v. Clawans*, 300 U.S. 613, 627, 81 L.Ed. 843, 847, 57 S.Ct. 660; *Reetz v. Michigan*, 188 U.S. 505, 47 L.Ed. 563, 23 S.Ct. 390; *Pittsburgh C. C. and St. Louis R. R. Co. v. Backus*, 154 U.S. 421, 38 L.Ed. 1031, 14 S.Ct. 1114; *McKane v. Durston*, 153 U.S. 684, 38 L.Ed. 867, 14 S.Ct. 913; 12 Am. Jur. 328, Section 638.

Mr. Justice White in *Hovey v. Elliott*, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841, strongly intimates that denial of a right of appeal for contempt would not be violative of the Due Process Clause of the Fourteenth Amendment:

> "Nor is there force in the contention that *Allen v. Georgia*, 166 U.S. 138, impliedly sustains the validity of the authority exercised by the court of the District of Columbia in the matter now under consideration. In the *Allen* case the accused had been regularly tried and convicted, and the error complained of was that the Georgia supreme court had violated the Constitution of the United States in refusing to hear his appeal because he had fled from justice. In affirming the judgment of the supreme court of Georgia, the court called attention to the distinction between the inherent right of defense secured by the due process of law clause of

the Constitution and the mere grace or favor giving authority to review a judgment by way of error or appeal. It said (p. 140):

"'Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. We might ourselves have pursued a different course in this case, but that is not the test. The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference.'

"The same view had been previously announced in *McKane v. Durston*, 153 U.S. 687, where the court said:

"'An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.'

"Whether in the exercise of its power to punish for a contempt a court would be justified in refusing to permit one in contempt from availing himself of a right granted by statute, where the refusal did not involve the fundamental right of one

summoned in a cause to be heard in his defense, and where the one in contempt was an actor invoking the right allowed by statute, is a question not involved in this suit. The right which was here denied by rejecting the answer and taking the bill for confessed because of the contempt involved an essential element of due process of law, and our opinion is therefore exclusively confined to the case before us."

In *Allen v. Georgia,* discussed by Mr. Justice White, Allen had been captured after dismissal of his appeal and resentenced to death. It would seem that Allen had a stronger claim under the Due Process Clause than does petitioner in the instant case. We have tried and fail to see how a reversal of the Washington Supreme Court could be reconciled in principle with the *Allen* case.

Petitioner speaks of the State Court appeal as a matter of right and not of favor. This can be confusing (See *Skirven v. Skirven* (Md.) 140 Atl. 205) and suggests "the tyranny of labels" (*Palko v. Connecticut,* 302 U.S. 319, 82 L.Ed. 288, 58 S.Ct. 149). Even if we assume that the distinction between matters of right and matters of favor has value for some purposes, the right to a state court appeal, as we have shown, is not a right accorded by the Due Process Clause of the Fourteenth Amendment. Under Washington law it is a right qualified by the court's inherent powers. And the degree to which this "right" is qualified is not a Federal question.

In *People v. Genet,* 59 N.Y. 82, 17 Am. Rep. 315, the Court of Appeals of New York made this provocative

comment upon the absoluteness of the right of an escaped criminal to appeal:

> "The provisions of the statutes giving to defendants in criminal cases the right to make a bill of exceptions are not so absolute as to displace all the other principles which belong to criminal proceedings, but must be taken in subordination to them.
>
> "We think they do not require the courts to encourage escapes and facilitate the evasion of the justice of the State by extending to escaped convicts the means of reviewing their convictions."

As Mr. Justice White intimated in his discussion of the *Allen* and *McKane* cases, in *Hovey v. Elliott, supra*, since the Fourteenth Amendment does not protect the right of appeal, the right may be taken away, in proper cases, because of contempt. A case is a proper case if, under all of the circumstances, the action is not arbitrary, but has reasonable justification.

It Was Reasonable Under All of the Circumstances to Dismiss Petitioner's Appeal

Respondents asserted a claim against petitioner in the Washington courts and sought due process of law. After verdict and judgment petitioner appealed but did not supersede. Respondents then asked that due process steps be taken toward enforcement of the judgment, and the Superior Court, a constitutional court of general jurisdiction, acting within now unquestionable power, in February of 1952, appointed a receiver and directed transfer to the receiver of $298,000.00 in United States bonds (R. 14-16). The receiver was not authorized to take over the operation of petitioner's business or to take possession of any assets

other than the bonds (R. 16). There was no threat that the bonds or their proceeds would be transferred to respondents during the pendency of petitioner's appeal. It was expressly proposed by respondents that the receiver simply preserve these assets until final outcome of the case (R. 49).

The order appointing a receiver and directing transfer of assets was made in proceedings supplemental to execution. These proceedings are not independent proceedings, but are merely auxiliary to and a continuation of the original action. *Arnold v. National Union of Marine Cooks and Stewards,* 142 Wash. Dec. 590, 257 P. (2d) 629, and cases cited, appeal dismissed, 346 U.S. 881, 98 L.Ed. (Advance, p. 80), 74 S.Ct. 136. The Superior Court had jurisdiction not only to enter the money judgment against petitioner but to make its orders in supplemental proceedings. *Arnold v. National Union of Marine Cooks and Stewards, supra.*

Petitioner transferred no bonds to the receiver and gave no explanation of its failure to do so, except so far as its appellate attack upon the validity of the order may be deemed an explanation. It then proceeded to reduce its cash and liquid securities from $360,011.58 September 26, 1951, very shortly after entry of judgment, to $90,389.00, at the end of 1952 (R. 45). It is apparent that by its contemptuous failure to comply with the Superior Court's order petitioner has to a very substantial degree defeated enforcement of the money judgment.

The Superior Court accorded petitioner a hearing and adjudicated petitioner in contempt of court. There

was little the Superior Court could do to coerce compliance with its order because practically all of the assets of petitioner were situated in the State of California and all of its officers with authority to transfer the assets were outside the jurisdiction of the Washington Court. In this posture of affairs respondents moved to dismiss petitioner's appeal from the money judgment. The motion was not acted upon until the contempt itself was reviewed by the State Supreme Court. Upon affirmance of the contempt adjudication, petitioner was given fifteen days within which to purge itself on pain of dismissal of its appeal. It did not purge itself and its appeal was dismissed.

The action of the State Supreme Court was reasonably calculated to further proper interests of the State. The State had an interest in the discharge of its duty to grant effective due process of law to respondents. It has a general interest in commanding respect for orders and decrees of its courts and in penalizing disrespect. Under the circumstances the only coercive action available to the State Court was dismissal of petitioner's appeal. Petitioner was proposing, in effect, that it be allowed to prosecute its appeal and use the pendency of the appeal to defeat action upon the judgment in California, meanwhile dissipating its assets so that, should it lose its appeal, the judgment would be uncollectible. We can scarcely believe that the Fourteenth Amendment compels the Supreme Court of the State of Washington to accept such a proposition. We submit that the action taken by the State Supreme Court was not "an arbitrary exercise of the powers of government, unrestrained by the established principles of pri-

vate rights and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L.Ed. 559. We take it that the essential of due process is reasonableness. *West Coast Hotel Company v. Parrish*, 300 U.S. 379, 391, 81 L.Ed. 703, 708, 57 S.Ct. 578, 108 A.L.R. 1330. It would seem that nothing that is reasonable and tends to serve a legitimate state interest could violate the Due Process Clause of the Fourteenth Amendment. We understand that the Fourteenth Amendment perpetuates principles identified with the due process guaranty of the Magna Charta, but this does not condemn procedural novelties consistent with those principles. *Twining v. New Jersey*, 211 U.S. 78, 53 L.Ed. 97, 29 S.Ct. 14. If the Washington Court's action is novel, it is novel only in a limited sense, and surely does violence to no historical due process principle.

In *Allen v. Georgia, supra*, Allen was held to have forfeited his right of review by escaping during the pendency of review proceedings. This escape did not make the case in any real sense moot because Allen was later captured and resentenced to death. This Court commented that it might have pursued a different course in the case, but that Allen had not been deprived of any fundamental right guaranteed by the Fourteenth Amendment. The Court said:

> "By escaping from legal custody he has, by the laws of most, if not all of the states, committed a distinct criminal offense; and it seems but a light punishment for such offense to hold that he has thereby abandoned his right to prosecute a writ of error, sued out to review his conviction. Otherwise he is put in a position of saying to the court: 'Sus-

> tain my writ and I will surrender myself, and take my chances upon a second trial; deny me a new trial and I will leave the state, or forever remain in hiding.' We consider this as practically a declaration of the terms upon which he is willing to surrender, and a contempt of its authority to which no court is bound to submit."

The Court referred to *Commonwealth v. Andrews*, 97 Mass. 543, in which it was held that a convicted person who escaped during the pendency of his case in the appellate court could not be heard by attorney and would be deemed to have waived his right to be heard.

This course of reasoning more than justifies the action taken by the Washington Supreme Court in the instant case. In the *Allen* case, Allen did nothing that necessarily defeated the Georgia court. In fact, it turned out that he was captured and resentenced to death, and the sentence presumably was carried into effect. Petitioner in the present case has now dissipated its assets so that there is a greater probability that the Washington courts have been completely and permanently frustrated.

In *Bronk v. Bronk* (Fla.) 35 So. 871, a man had been taken into custody under a writ of *ne exeat* in a civil action for maintenance and alimony brought by his wife. He escaped and left the jurisdiction. The court, declining to entertain and hear certain assignments of error, said:

> "Doubtless the general rule is that a party is not deprived of any strict legal right to be heard by placing himself in contempt of the court, especially if there be other means available by which the court may enforce its orders. *Hovey v. Elliott*, 167 U.S.

469, text 428, 17 S.Ct. 841, 42 L.Ed. 215, and cases there cited. But the right to be heard upon appeal or writ of error has not been held to be one which a party cannot deprive himself of by his voluntary act of putting himself in contempt of the court by escaping from custody and evading the power and processes of the law and of the courts. It is distinctly held in the above cited case, on pages 443 and 444, 167 U.S., p. 854, 17 S.Ct., 42 L.Ed. 415, that such a question was not involved in that suit. In this state it is decided that an appellate court will refuse to hear a criminal case on writ of error where the plaintiff in error has escaped, and is not within the control of the court below, either actually by being in custody, or constructively by being out on bail. *Woodson v. State*, 19 Fla. 549. This case has been repeatedly followed by this court. The principle of those cases applies here."

The cases involving contemptuous violation by appellants of decrees concerning custody of children seem directly analogous and the reasoning in those bases bears directly upon the instant case.

In *Casebolt v. Butler* (C.A. Ky.) 194 S.W. 305, the Court said, in refusing *mandamus* to compel certification of a bill of exceptions for an appellant who violated a custody decree and removed a child from the jurisdiction of the Court:

"If his appeal on a proper record should be brought to this Court and the ruling of Judge Butler affirmed, there is no way by or through which the judgment of this Court could be enforced. If the judgment was adverse to Casebolt, he would doubtless continue to keep the custody of the child and remain outside the jurisdiction of the Court,

but if the judgment of this court was favorable to him, he would probably return with the child and submit himself to the jurisdiction of the Court. In other words, the attitude of Casebolt is that: 'If you decide the case in my favor, well and good, but, if you do not, I will keep the child out of your reach, so that, no matter what the decision of the Court may be I will continue to have the custody of the child.' Under circumstances such as these we are clearly of the opinion that Casebolt should not be permitted to thus trifle with the Court and so conduct himself as to make its orders and judgments a mere nullity unless he voluntarily sees proper to obey them.

"The argument is made in his behalf that the trial court might refuse while he was in contempt to grant a favor or refuse to do something concerning which it might exercise a discretion, but that here, as the statute gives him the right of appeal, his contempt does not excuse the trial judge from giving him that which under law he has the right to demand.

"It is true that the statute gives to Casebolt the right to appeal from the order entered by Judge Butler, but this right he has forfeited by his own voluntary and willful acts. He is here asking the recognition of a right that he conceives will be beneficial to him, and at the same time is saying to the Court: 'If I should be mistaken and my appeal should not change the status of things, I will pay no attention to your order or judgment.'

"If a defendant, who is by statute given the right to prosecute an appeal, can forfeit this right by escaping jail and putting himself outside the jurisdiction of the Court so that an adverse judgment would not affect him, we are unable to perceive why

a party to a civil suit may not likewise forfeit his right to appeal by voluntarily refusing to obey the order of Court from which he desires to prosecute an appeal, and also by expressly putting himself in the position in which he would not be amenable to the processes of the Court in the event that judgment was against him."

In *MacPherson v. MacPherson* (Calif.) 89 P.(2d) 382, the Supreme Court of California unanimously said:

"In secluding the children in a foreign country and alienating them, appellant violated not only his agreement with plaintiff and the provisions of interlocutory and final decrees of divorce, but he has also wilfully and purposely evaded legal processes and contumaciously defied and nullified every attempt to enforce the judgments and orders of the California courts, including the very order from which he seeks relief by this appeal. Such flagrant disobedience and contempt effectually bar him from receiving the assistance of an appellate tribunal. A party to an action cannot, with right or reason, ask the aid and assistance of the court in hearing his demands while he stands in an attitude of contempt to legal orders and processes of the courts of the state."

The appeal was dismissed.

In *Lindsay v. Lindsay*, 99 N.E. 608, 255 Ill. 442, a mother violated a decree awarding custody of her child to another, and removed the child from the jurisdiction. She attempted to review the decree in the Illinois Supreme Court. The Court said she had no right to be heard:

"The weight of authority seems to be that a

party in contempt is not entitled to prosecute or defend an action, when the nature of his contempt is such as to hinder and embarrass the due course of procedure in the cause."

In *Henderson v. Henderson* (Mass.) 107 N.E.(2d) 773, the Court said of an appeal by a party who contemptuously removed a child from the jurisdiction:

> "The question somewhat resembles that presented by a defendant in a criminal case whose conduct in escaping custody after conviction has been held to be a waiver of all right to seek a reversal in appellate proceedings. *Commonwealth v. Andrews*, 97 Mass. 543; *Allen v. Georgia*, 166 U.S. 138, 17 S.Ct. 525, 41 L.Ed. 949."

The Court gave appellant 30 days to purge herself on pain of dismissal of her appeal.

In *Knoob v. Knoob* (Calif.) 218 Pac. 568, another custody case, the Court said:

> "But one conclusion can be reached from the foregoing facts. It is very clear that the appellant has determined to set at naught the due process and orders of the courts of California, and does not intend to obey their mandate respecting the custody of the minor child. Under such circumstances she is not entitled to press her appeal to this court. By her appeal she is seeking the court's aid, and it is manifestly just and proper that in invoking that aid she should submit herself to all legitimate orders and processes. She cannot, with right or reason, ask the aid or assistance of this Court in hearing her demands, while she stands in an attitude of contempt to the legal orders and processes of the courts of this state, which she seeks to avoid through the intervention of an appeal to this tri-

bunal. *O'Neill v. Thomas Day Co.*, 152 Cal. 357, 362, 92 Pac. 876, 14 Ann. Cases 970."

The appeal was dismissed.

See also *Garrett v. Garrett* (Ill.) 173 N.E. 107; *Campbell v. Justices of Superior Court* (Mass.) 73 N.E. 659; *McEntire v. McEntire* (Ala.) 104 So. 804.

It seems to us that petitioner's brief involves the weighing of several values. There is the interest of petitioner in obtaining review of the money judgment against it, and the public interest in keeping the courts open for the administration of justice to all persons. There is the interest of respondents in the enforcement of their judgment and their right to its collection. There is the interest of the State of Washington in the discharge of its duty to secure due process of law to respondents, and its interest in the improvement of the quality of its justice by appellate procedures. There is the interest of the State in commanding respect for its orders and decrees so that its judicial machinery is effective and is not reduced to an apparent travesty. Weighing such values we submit that the action of the State Supreme Court can scarcely be condemned as unreasonable, arbitrary, thoughtless.

Petitioner's Conduct Constituted an Admission of Lack of Merit in Its Appeal

Petitioner has never given the State Court any reason whatever for refusal to comply with the order in supplemental proceedings, except to argue that the order is invalid. By its contemptuous conduct it has rendered a judgment of the Washington Court relatively meaningless. It has reduced an important case near-

ly to sham. It has to a substantial degree devitalized a judgment by contumacious dissipation of its own assets. It scarcely would do these things if it had faith in its appeal. The Washington Court was justified in accepting this conduct as a conclusive admission that petitioner's appeal had no merit. An implied admission arising from contemptuous conduct may be given effect, even to deny a hearing altogether, without violation of the Due Process Clause. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 53 L.Ed. 530, 29 S.Ct. 370; *Lawson v. Black Diamond Coal Mining Co.*, 44 Wash. 26, 86 Pac. 1120.

As it turned out, the appeal was later found to be without merit. Petitioner and Harris had joined their appeals and had joined in briefs (R. 50, 19, 21, 39). The appeal of Harris was separately docketed and argued (R. 52; *Arnold v. National Union, etc.*, 144 Wash. Dec. 165, 265 P.(2d) 1051). This argument was made from the joint briefs. The Supreme Court affirmed the judgment. *Arnold v. National Union of Marine Cooks and Stewards*, 144 Wash. Dec. 165, 265 P. (2d) 1051.

Petitioner Has Been Heard Upon Appeal

Respondents consented to dismissal of the case as to Harris, provided that judgment was preserved as to petitioner. This was proposed because Harris was without apparent assets and respondents believed the judgment valueless as against him. Harris refused this offer, and it became apparent to the Court that petitioner was using Harris as a stalking horse to prosecute an appeal from which petitioner was barred by its con-

tempt. Petitioner intimated as much by suggesting that the dismissal would be no more than a gesture because reversal upon the Harris appeal would inure to petitioner's benefit (R. 21). Leaving out of consideration any possible moral impact upon petitioner, salutary effects in other cases, and the possibility of Harris abandoning his appeal, which he did not do, petitioner was probably right. *LeFevre v. Fidelity and Deposit Company*, 9 Wn.(2d) 145, 113 P.(2d) 1014.

Petitioner and Harris had filed a joint brief upon joint appeals from the money judgment (R. 50, 19, 21, 39). At stages of this case petitioner has been separately represented. At other stages petitioner and Harris have been represented by the same attorneys. It will be noted that Mr. Caughlan filed a brief in the State Supreme Court May 15, 1952, as attorney for both appellants, petitioner and Harris (R. 17-23).

The Washington Supreme Court recognized that Harris had no conceivable interest to justify his further prosecution of the appeal, except the ulterior desire to aid petitioner:

> "At the time of the argument on the motion to dismiss the appeal of the union, respondents' counsel stated in open court that they have no desire to, and will not, enforce their judgment against Harris. They have since filed and argued a motion in this court asking us to remand the case to the superior court in order that they may have Harris dismissed, he having been a proper but not a necessary party. Harris has opposed the granting of that motion, which would free him from all liability on the judgment and would give him all the re-

lief he could possibly hope to secure by virtue of this appeal.

"It is apparent to this court that the real party in interest in this appeal is the union, which persists in its contemptuous refusal to obey the lawful order of the Superior Court for King County. We will, however, proceed to a consideration of this appeal on the merits, notwithstanding our feeling that the union and its agents are thereby getting a consideration to which they are not entitled." *Arnold v. National Union of Marine Cooks and Stewards,* 144 Wash. Dec. 165, 265 P.(2d) 1051.

Thus, petitioner has been heard through virtual representation.

Petitioner's Equal Protection Claim Is Not Before This Court

Petitioner's only mention of the Equal Protection Clause was made belatedly on June 13, 1952 (R. 26, at 28), and the nature of the claim then made was that petitioner's rights would be violated if, "without inquiring as to whether there was jurisdiction or justification for the Superior Court's adjudication, this Court should enter its own coercive order in contempt proceedings without receiving any evidence or conducting any hearing—without even making a determination as to whether the bonds to be transferred are, or have been, at any time material to this proceeding in the possession or control of either of appellants." This claim is not urged now and could not be because the State Supreme Court refused to act upon the motion for dismissal of the appeal until it had reviewed the contempt adjudication and affirmed it (R. 23-24).

We understand that "this Court will not pass upon any federal question not shown by the record to have been raised in the State Court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented." *People ex rel. Cohn v. Graves*, 300 U.S. 308, 81 L.Ed. 666, 57 S.Ct. 466. This rule has peculiar force when applied to review of state court decisions as to the validity of state legislation (*Wilson v. Cook*, 327 U.S. 474, 90 L.Ed. 793, 66 S.Ct. 663), and the same considerations enter here, where action of the highest Court of the State, governing a remedy in that Court, is under attack.

Petitioner Has Not Been Denied Equal Protection of Laws

We maintain that petitioner did not give the State Court an opportunity to consider its argument on this point because petitioner did not tender such an argument to the State Court. Additionally, there is no conceivable basis for inferring a denial of equal protection.

Petitioner has not been singled out for special treatment. There is no reason to suppose that other appellants who place themselves in petitioner's position will not be treated in the identical way that petitioner has been treated. It is not likely that a comparable situation will often arise, but there is no reason to assume that the Supreme Court of the State of Washington will apply a different set of rules to other litigants where the facts make applicable the rule of decision applied to petitioner.

The fact that most appellants do not forfeit their rights of appeal and are not denied such rights, does not show any inequality in operation of Washington law. Equal protection does not mean indiscriminate operation of laws, and persons in various relations may be variously treated. *Magoun v. Illinois Trust, etc., Bank*, 170 U.S. 283, 42 L.Ed. 1037, 18 S.Ct. 594. Things which are different in fact or opinion need not be treated as if they are the same. *Tigner v. Texas*, 310 U.S. 141, 84 L.Ed. 1124, 60 S.Ct. 879. The Clause means that the rights of all persons rest on the same rule under similar circumstances. *Hartford Steam Boiler Inspection and Insurance Co. v. Harris*, 301 U.S. 459, 81 L.Ed. 1223, 57 S.Ct. 838. The right to equal protection is not denied when the same law or course of procedure is applicable to all other persons under similar circumstances and conditions. *Tinsley v. Anderson*, 171 U.S. 108, 43 L.Ed. 91, 18 S.Ct. 805.

Petitioner seems to consider these cases inapplicable because they involved governmental actions quite different from the action of the Washington Supreme Court involved in the instant case (Reply Memorandum for Petitioner in Support of Its Petition for a Writ of Certiorari, pages 3 and 4). We, on the contrary, understand these statements to be statements of general principle applicable to all state action.

Petitioner's argument that it has been denied equal protection leads us to an ultimate conclusion that no litigant can be denied a procedural activity granted to other litigants, no matter how dissimilar their conduct may be. We contend that if there is a reasonable basis

for the distinction, one litigant may be accorded a procedural right denied to another. The whole question is whether the state has acted reasonably in drawing the line. Thus, the equal protection problem comes very close to the due process problem. The two safeguards may not always be interchangeable in discrimination cases (*Bolling v. Sharpe*, 347 U.S. 497, 98 L.Ed. (Advance, p. 591), 74 S.Ct. 693), but it would seem that here the action of the State Supreme Court was not violative of either guaranty unless it was arbitrary, and that if it was arbitrary it was violative of both.

Jurisdiction of the State Courts Over the Subject Matter of the Case

In a footnote at the end of its brief petitioner announces an intention to argue to the State Court that jurisdiction over the subject matter of the instant case was preempted by the Labor-Management Relations Act, 1947, 29 U.S.C.A. Sec. 141, *et seq.*, 61 Stat. 136, *et seq.* There would be no substance to such an argument. Neither the right nor the remedy created by the Act and applied by the National Labor Relations Board in *Pacific American Shipowners Association, et al.*, 98 NLRB 592, overlaps the instant case.

As appears in the decision of the Board, petitioner represented steward department employees of certain employers. The Board found that through the hiring arrangements maintained by those employers and petitioner, petitioner had the power to, and did, discriminate against a large number of such employees, including most of respondents.

The instant case is an action to recover damages for libel. It is further removed from the preempted field than *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 657, 98 L.Ed. (Advance, p. 686), 74 S.Ct. 833, because the loss of employment involved in the Board case, the injury for which the Federal Act provides monetary relief, is not involved in the tort action. Such loss of employment resulted from the illegal hiring practices established by petitioner and certain employers. It did not result from the publication of the libel, and could not enter into the assessment of damages in the libel action. In this respect the appendix to petitioner's brief is somewhat misleading because the juxtaposition of excerpts from the decision of the Board makes it seem that back pay was awarded because of the libelous publication, which was held to be a blacklist, violative of the Act. It is true that the publication was held to violate the Act, just as the activity of the union in *United Construction Workers v. Laburnum Construction Corp., supra*, was assumed by this Court to have violated the Act, but there was no back pay awarded for loss of earnings resulting from the blacklist.

In addition, the remedies do not overlap for the reason that no special damages were claimed by respondents in the libel suit (*Arnold v. National Union, etc.*, 36 Wn. (2d) 557, 219 P.(2d) 121), and the jury was instructed that it must not attempt to compute or award damages for specific loss of earnings, if any. This instruction is not in the record before this court, but it is the well established rule in Washington that there can be no recov-

ery of particular items of damage where there is an allegation only of general damage. *King v. King*, 83 Wash. 615, 145 Pac. 971; *Woodward v. Blanchett*, 36 Wn.(2d) 27, 216 P.(2d) 228. The only monetary award by the Board was for specific pay loss.

The argument suggested by petitioner has never been intimated to the State Courts although petitioner filed in the State Supreme Court a brief of 316 pages, not counting an appendix of 61 pages. If the point was thereafter suggested by *Garner v. Teamsters, etc., Union*, 346 U.S. 485, 98 L.Ed. (Advance, p. 161), 74 S.Ct. 161, and *Capital Service, Inc., v. N.L.R.B.*, 347 U.S. 501, 98 L.Ed. (Advance, p. 594), 74 S.Ct. 699, any doubt as to State Court jurisdiction arising from those cases is completely removed by *United Construction Workers v. Laburnum Construction Corp., supra*, so that the argument now has less color than it would have had before *Garner*.

CONCLUSION

Respondents ask that the judgment of the Supreme Court of the State of Washington be affirmed.

Respectfully submitted,

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